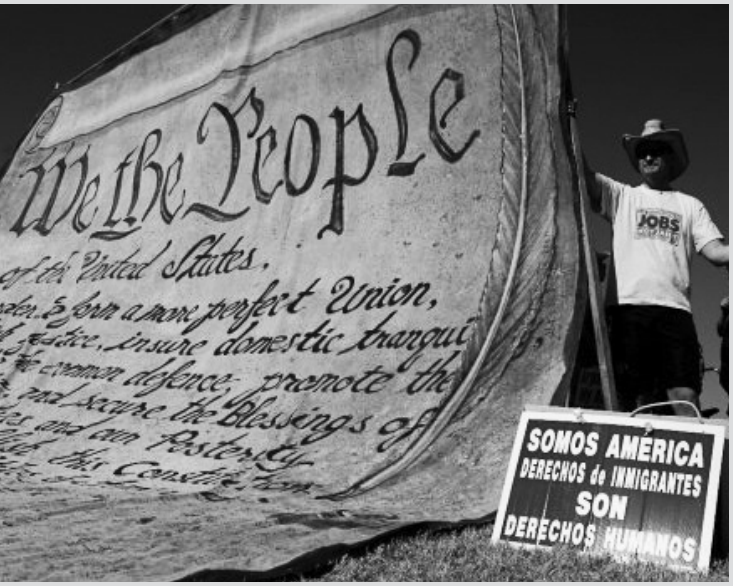

THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES

A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

rights★working★group

ACLU
AMERICAN CIVIL LIBERTIES UNION

THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES

A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination

BY THE AMERICAN CIVIL LIBERTIES UNION
AND THE RIGHTS WORKING GROUP

THE PERSISTENCE OF RACIAL
AND ETHNIC PROFILING IN THE UNITED STATES:

A Follow-Up Report to the U.N. Committee
on the Elimination of Racial Discrimination

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ABOUT THE ACLU

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States. The ACLU is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I, including the persecution of political dissidents and the denial of due process rights for non-citizens. In the intervening decades, the ACLU has advocated to hold the U.S. government accountable to the rights protected under the U.S. Constitution and other civil and human rights laws. Since the tragic events of 9/11, the core priority of the ACLU has been to stem the backlash against human rights in the name of national security.

In 2004, the ACLU created a Human Rights Program specifically dedicated to holding the U.S. government accountable to universal human rights principles in addition to rights guaranteed by the U.S. Constitution. The ACLU Human Rights Program incorporates international human rights strategies into ACLU advocacy on issues relating to racial justice, national security, immigrants' rights, and women's rights.

The ACLU's Racial Justice Program aims to preserve and extend the constitutional rights of people of color. Committed to combating racism in all its forms, the Program's advocacy includes litigation, community organizing and training, legislative initiatives, and public education.

The ACLU's Immigrants' Rights Project was established in 1987 to expand and enforce the civil rights and civil liberties of non-citizens and to combat public and private discrimination against immigrants. Through a comprehensive program of impact litigation and public education, the Project files constitutional and class action lawsuits protecting the historic guarantee to judicial review, enforcing fair employment practices and maintaining constitutional safeguards against detention practices and biased asylum adjudication.

The Washington Legislative Office of the ACLU is responsible for advancing the organization's civil liberties goals in the political branches of the federal government through a team of lobbyists, policy and communications specialists, and organizers who work collaboratively to bring the voices of our hundreds of thousands of supporters and activists and our national network of affiliates to Congress and the federal agencies.

The full breadth of the ACLU's work can be seen at www.aclu.org.

ABOUT RIGHTS WORKING GROUP

Formed in the aftermath of September 11th, the Rights Working Group (RWG) is a national coalition of civil liberties, national security, immigrant rights and human rights organizations committed to restoring due process and human rights protections that have been eroded in the name of national security. RWG works to ensure that everyone in the United States is able to exercise their rights, regardless of citizenship or immigration status, race, national origin, religion or ethnicity. With more than 260 member organizations across the United States, RWG mobilizes a grassroots constituency in support of a policy advocacy agenda that demands accountability from the U.S. government for the equal protection of human rights.

The RWG Steering Committee is composed of leading organizations representing the key constituencies of the coalition. Members include the ACLU as well as the American-Arab Anti-Discrimination Committee; American Immigration Lawyers Association; Arab American Institute; Arab Community Center for Economic and Social Services; Asian American Justice Center; Bill of Rights Defense Committee; Breakthrough; Center for National Security Studies; Coalition for Humane Immigrant Rights of Los Angeles; Human Rights First; Human Rights Watch; Illinois Coalition for Immigrant and Refugee Rights; Leadership Conference on Civil Rights & Education Fund; National Council of La Raza; National Immigration Forum; National Immigration Law Center; New Jersey Immigration Policy Network; New York Immigration Coalition; One America; Open Society Policy Center; South Asian American Leaders of Tomorrow; Tennessee Immigrant and Refugee Rights Coalition (TIRRC).

The full breadth of the RWG's work can be seen at www.rightsworkinggroup.org.

rights ★ working ★ group

The ACLU and Rights Working Group welcome the opportunity to provide follow-up information on the United States' compliance with the International Convention on the Elimination of All Forms of Racial Discrimination to the U.N. Committee on the Elimination of Racial Discrimination through this follow-up report. The report is based on the ACLU's and Rights Working Group member organizations' advocacy in federal and state legislatures and courts.

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The ACLU co-authored this report with the **Rights Working Group (RWG)**. Margaret Huang, executive director of RWG, drafted sections of and edited the report. RWG staff Jumana Musa and Aadika Singh provided substantive material and input. Harpreet Singh of United Sikhs and staff of the American-Arab Anti-Discrimination Committee, the Arab Community Center for Economic and Social Services, the Asian Law Caucus, the Center for Immigrants' Rights at the Penn State University's Dickinson School of Law, the Council on American-Islamic Relations, Muslim Advocates, One America, and South Asian Americans Leading Together contributed materials to the report, as did other RWG member groups. RWG Steering Committee members, including the Asian American Justice Center, the Coalition for Humane Immigrant Rights in Los Angeles, the National Immigration Law Center, and the Tennessee Immigrant and Refugee Rights Coalition, reviewed drafts and contributed to the report.

Substantial contributions were also made by Andrea Ritchie on behalf of the **U.S. Human Rights Network Law Enforcement Working Group (LEWG)**. The LEWG is made up of civil rights attorneys and grassroots, local, state and national organizations working to document and address issues of police misconduct and abuse in the United States, including racial profiling, race-based policing, and racially disparate uses of excessive force, lethal force, rape and sexual assault, searches, and verbal and sexual harassment by law enforcement against people of color. LEWG's 2008 submission to the Committee on the Elimination of Racial Discrimination on the occasion of its review of the U.S. government's Second and Third Periodic Reports was endorsed by over 100 national, state, and local organizations. For more information on the shadow reporting process and on the LEWG submission, please go to www.ushrnetwork.org/cerd_shadow_2008.

In their work related to this report, the ACLU and the Rights Working Group have coordinated and will continue to coordinate efforts with the broad coalition of U.S. social justice and human rights organizations led by the **U.S. Human Rights Network**. For further information concerning the U.S. Human Rights Network, please visit www.ushrnetwork.org.

INTRODUCTION

The historic fight against discrimination and racial bias in the United States continues and has perhaps become more challenging in the 21st century. Although fewer *de jure* forms of discrimination remain in existence, *de facto* racial disparities continue to plague the United States and curtail the enjoyment of fundamental human rights by millions of people who belong to racial and ethnic minorities. As highlighted by the United Nations expert on racism following his official visit to the U.S. last year, "Racism and racial discrimination have profoundly and lastingly marked and structured American society. The United States has made decisive progress … [h]owever, the historical, cultural and human depth of racism still permeates all dimensions of life of American society."[1]

Policies and practices that appear race-neutral but disproportionately restrict the rights and freedoms of people of color are difficult to challenge, and establishing their discriminatory nature in the public consciousness and among policymakers is an uphill battle. Racial profiling by law enforcement, and the correlate criminalization of people of color, provide one such example. Despite overwhelming evidence of its existence, often supported by official data, racial profiling continues to be a prevalent and egregious form of discrimination in the United States. Both Democratic and Republican administrations have acknowledged that racial profiling is unconstitutional, socially corrupting and counter-productive, yet this unjustifiable practice remains a stain on American democracy and an affront to the promise of racial equality.

Since September 11, 2001, new forms of racial profiling have affected a growing number of people of color in the U.S., including members of Muslim, Arab, and South Asian communities. The Obama administration has inherited a shameful legacy of racial profiling codified in official FBI guidelines and a notorious registration program that treats Arabs and Muslims as suspects and denies them the presumption of innocence and equal protection under the law. As noted by Rep. John Conyers, "Since September 11, our nation

Banner flown in El Paso, Texas to protest racial profiling of immigrants. Photo courtesy of Ray Ybarra; June 2006.

"Racism and racial discrimination have profoundly and lastingly marked and structured American society. The United States has made decisive progress... [h]owever, the historical, cultural and human depth of racism still permeates all dimensions of life of American society." —U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance

has engaged in a policy of institutionalized racial and ethnic profiling … If Dr. Martin Luther King Jr. were alive today … he would tell us we must not allow the horrific acts of terror our nation has endured to slowly and subversively destroy the foundation of our democracy."[2]

Equally troubling has been the federal government's encouragement of unprecedented raids of immigrant (particularly Latino) communities and workplaces by local law enforcement in cooperation with federal agencies. These policies have unjustly expanded the purview of and undermined basic trust in local law enforcement, alienated immigrant communities, and created an atmosphere of fear. Senator Robert Menendez noted, "The legitimate desire to get control over our borders has too often turned into a witch-hunt against Hispanic Americans and other people of color."[3] According to recent reports by the Leadership Conference on Civil Rights[4] and the Southern Poverty Law Center, inflammatory anti-immigrant rhetoric has led to a dramatic increase in hate crimes against and racial profiling of Latinos.[5]

This report, based on the work of the ACLU and the Rights Working Group, analyzes the prevalence of racial profiling on the federal, state and local levels. It represents only the tip of the iceberg; a variety of additional examples of the widespread nature of racial profiling no doubt exist. This report is submitted solely to the U.N. Committee on the Elimination of Racial Discrimination, but it is our hope that its findings and recommendations will be seriously considered by the Obama administration, by Congress, and by state and local governments in the effort to bolster the fight against racial profiling.

As an Illinois State Senator, President Obama broadly championed state legislation to end racial profiling, and as a U.S. Senator he co-sponsored the End Racial Profiling Act. He appointed an Attorney General to the Department of Justice who has stated that racial profiling is not good law enforcement and is committed to combating this practice.[6] We are hopeful that the Department of Justice investigation of Maricopa County, Arizona Sheriff Joe Arpaio and those under his supervision will mark a new beginning and will be followed by similar investigations and robust policy changes as recommended in this report.

Jamil Dakwar
Director, ACLU Human Rights Program
June 2009

"Since September 11, our nation has engaged in a policy of institutionalized racial and ethnic profiling... If Dr. Martin Luther King Jr. were alive today... he would tell us we must not allow the horrific acts of terror our nation has endured to slowly and subversively destroy the foundation of our democracy."—U.S. Rep. John Conyers

Photo courtesy of eXcalibur908 via Flickr; June 2008.

EXECUTIVE SUMMARY

The international community has recognized that racial profiling is a violation of human rights, defining it as "the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity[.]"[7] The U.N. Committee on the Elimination of Racial Discrimination highlighted the importance of combating racial profiling in its General Comment XXXI on combating racism in the administration of the criminal justice system.[8]

On February 27, 2001, just weeks after being sworn into office as America's 43rd President, George W. Bush declared before a joint session of Congress that racial profiling is "wrong, and we will end it in America."[9] President Bush's comments were reaffirmed by then-Attorney General John Ashcroft, who stated that the Bush administration was committed to ending racial profiling because "[u]sing race . . . as a proxy for potential criminal behavior is unconstitutional, and it undermines law enforcement by undermining the confidence that people can have in law enforcement."[10]

Photo courtesy of Susana Millman.

Sadly, the Bush administration's rhetoric never resembled reality nor did it translate into concrete policy change to effect the stated goal. Even worse, several Bush administration policies actually *exacerbated* racial and ethnic profiling, especially in the wake of 9/11. As a result, in 2009, with a new administration in office, the practice of racial profiling by members of law enforcement at the federal, state, and local levels remains a widespread and pervasive problem throughout the United States, impacting the lives of millions of people in African American, Asian, Latino, South Asian, and Arab communities.[11]

Indeed, data and anecdotal information from across the country reveal that racial minorities continue to be unfairly victimized when authorities investigate, stop, frisk, or search them based upon subjective identity-based characteristics rather than identifiable evidence of illegal activity. Victims continue to be racially or ethnically profiled while they work, drive, shop, pray, travel, and stand on the street. The disproportionate rates at which minorities are stopped and searched, in addition to the often high concentrations of law enforcement in minority

■ [T]he practice of racial profiling by members of law enforcement at the federal, state, and local levels remains a widespread and pervasive problem throughout the United States, impacting the lives of millions of people in African American, Asian, Latino, South Asian, and Arab communities.

communities, continue to have a tremendous impact on the over-representation of minorities (and especially members of African American, Latino, and Native American communities) in the American criminal justice system.

Unfortunately, certain U.S. government policies continue to contribute significantly to the persistence of racial profiling. For example, over the last seven years, the federal government has aggressively transferred substantial responsibility for enforcement of civil immigration laws to state and local police and other state and local agencies, resulting in the increased profiling of people of color suspected of being immigrants and non-citizens. To support collaboration with local law enforcement, the Department of Homeland Security (DHS), through its Immigration and Customs Enforcement (ICE) agency, established the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (also known as ICE ACCESS programs). The ICE ACCESS programs include Border Enforcement Security Task Forces; the Criminal Alien Program; the Fugitive Operations Teams; the Secure Communities program; and the Delegation of Immigration Authority, otherwise known as the 287(g) program.[12]

While each of these programs has raised concerns about racial profiling, the 287(g) program is perhaps the most infamous. The program has been criticized for encouraging (or at the very least allowing for) illegal racial and ethnic profiling resulting in the harassment of both immigrants and U.S. citizens, particularly in Latino communities, further marginalizing already vulnerable populations.[13] Low-wage Latino immigrant workers are especially threatened, as are low-wage South Asian workers, who face an intersection of anti-immigrant hostility, employment abuse, and post-9/11-related discrimination.[14]

In both its initial report to the Committee and in its January 2009 update, the U.S. government cites the Justice Department's 2003 *Guidance Regarding*

"Operation Meth Merchant" racially profiled Indian immigrant merchants and shop workers in northwest Georgia. As a result of this unjust targeting, Indian immigrant workers and their communities were economically and psychologically devastated and families were torn apart. Photo courtesy of Deepali Gokhale; January 2006.

the Use of Race by Federal Law Enforcement Agencies designed to "ban" federal law enforcement officials from engaging in racial profiling.[15] This reference, used by the U.S. government to support the contention that it is taking steps to eradicate profiling, is curious at best and misleading at worst. In reality, the guidance has proven to be both inadequate and ineffective, largely because it "does not cover profiling based on religion, religious appearance, or national origin; does not apply to state or local law enforcement agencies; does not include any enforcement mechanisms; does not specify punishment for violating officers/agencies [not in compliance]; and contains a blanket exception for 'national security' and 'border integrity' cases. [Finally,] [t]he [g]uidance is an advisory, and hence is not legally binding."[16]

Thus, instead of curbing racial profiling, the exceptions in the guidance have actually *promoted* profiling and created a *stronger* justification for state and local law enforcement agencies to racially profile individuals who are or who appear to be Arab, Muslim or South Asian.[17] It is no surprise that in the wake of the guidance, and absent the requirement of legal proof of suspected criminal activity, Arabs, Muslims and South Asians have been disproportionately victimized through various governmental initiatives including FBI surveillance and questioning, the NSEERS (special registration) program, border stops, airline profiling and the creation of "no-fly lists," and religious surveillance.[18]

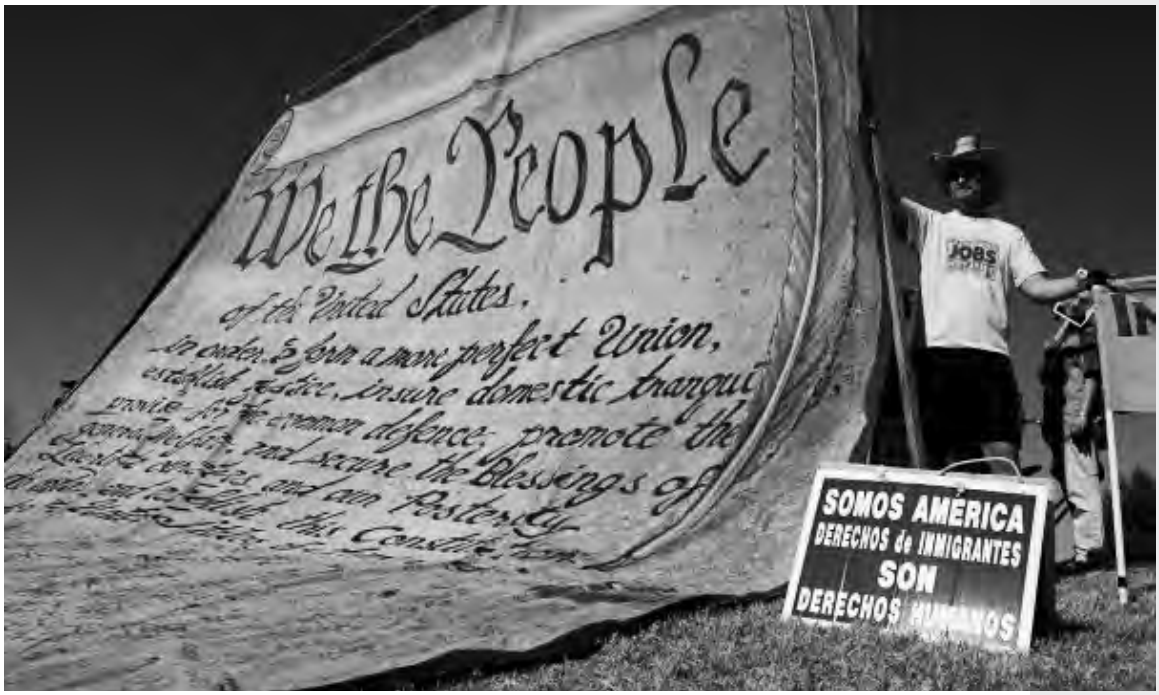
In addition to the flawed guidance, a major impediment to the eradication of racial profiling remains the continued unwillingness or inability of the U.S. government to pass federal legislation prohibiting racial profiling with binding effect on federal, state, or local law enforcement. While it is clearly the province of Congress to create and enact legislation, the Bush administration chose to take no action to encourage the legislature to pass the End Racial Profiling Act (ERPA), which has continued to languish in Congress since its introduction in 1997.[19] ERPA is *the* key piece of federal legislation as it would compel all law enforcement agencies to ban racial profiling; create and apply profiling procedures; document data on stop/search/arrest activities by race and gender; and create a private right of action for victims of profiling.[20]

[A] major impediment to the eradication of racial profiling remains the continued unwillingness or inability of the U.S. government to pass federal legislation prohibiting racial profiling with binding effect on federal, state, or local law enforcement.

Because any legal remedy for racial discrimination by law enforcement currently requires specific proof of intent to discriminate, it is extremely difficult, if not impossible, for individual victims to challenge violations of their rights and broader law enforcement practices without comprehensive data that can measure the larger impact on minority communities. As such, ERPA is a critical means of promoting government monitoring and documentation of racial profiling, including the collection of comprehensive data on stops, searches, arrests, and law enforcement officers' explanations for these encounters.

Women of color who continue to face intersectional forms of discrimination and inequality are disproportionately burdened by encounters with law enforcement and over-represented in the criminal justice system.[21] Although the CERD Committee requires State Parties to report in detail "factors affecting and difficulties experienced in ensuring the equal enjoyment by women, free from racial discrimination, of rights under the Convention,"[22] the U.S. government has continued to fail in regard to this reporting requirement.[23] It is thus equally important for the government to document both the race and gender of those individuals who have encounters with law enforcement as even within the context of racial profiling, women of color face overlapping forms of racial and gender-based discrimination.

As a candidate, President Barack Obama's campaign released a "Blueprint for Change," which stated that, if elected, "Obama and Biden will ban racial profiling . . . ".[24] Recently, Attorney General Eric Holder stated that ending racial profiling was a "priority" for the Obama administration and that profiling was "simply not good law enforcement".[25] In 2005 and in 2007, then-Senator Obama cosponsored ERPA.[26] The Obama administration now has the opportunity to bring the weight of the executive branch in support of the passage of ERPA as the passage of this legislation is a crucial component in a more comprehensive approach to addressing the intractable problem of racial and ethnic profiling and discrimination. The ACLU and the Rights Working Group call upon the Obama administration to make good on these promises and improve upon the disappointing record of the past eight years. The U.S. government must take urgent, direct, and forceful action to rid the nation of the scourge of racial and ethnic profiling and bring the U.S. into compliance with its human rights obligations under this Convention.



March to End Racial Profiling and Stop the Raids, Phoenix, Arizona. Photo courtesy of Mary Lunetta, ACLU of Arizona; February 2009.

ANALYSIS OF THE U.S. GOVERNMENT'S FOLLOW-UP SUBMISSION TO CERD ON RACIAL PROFILING

In 1994, the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which obligates all levels of government (federal, state, and local) to comply with the requirements of the treaty.[27] The ACLU and the Rights Working Group welcome the U.S. government's follow-up submission to the Committee submitted in January 2009, and appreciate the effort the U.S. made to comply with its treaty reporting obligations. Below is a brief analysis of the sections of the U.S. government's submission dealing with racial profiling.

profiling – including the elaboration by the Civil Rights Division of the U.S. Department of Justice of the *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* – such practice continues to be widespread. In particular, the Committee is deeply concerned about the increase in racial profiling against Arabs, Muslims and South Asians in the wake of the 11 September 2001 attack, as well as about the development of the National Entry and Exit Registration

■ [D]espite clear evidence that racial profiling continues to be a problem for federal, state and local law enforcement agencies, the U.S. government has taken little action to investigate, prosecute or combat the practice.

Inaction on the NSEERS Program and Federal Anti-Profiling Legislation

In paragraph 14 of its Concluding Observations to the U.S., the Committee focused on two particular concerns: the failure to pass federal legislation to stop the practice of racial profiling, and the failure to end the National Security Entry and Exit Registration System (NSEERS) program, which targets individuals on the basis of national origin and religion.[28] The Committee expressed its concern as follows:

> The Committee notes with concern that despite the measures adopted at the federal and state levels to combat racial

System (NEERS) [sic] for nationals of 25 countries, all located in the Middle East, South Asia or North Africa (arts. 2 and 5 (b)).

Bearing in mind its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party strengthen its efforts to combat racial profiling at the federal and state levels, inter alia, by moving expeditiously towards the adoption of the End Racial Profiling Act, or similar federal legislation. The Committee also

> draws the attention of the State party to its general recommendation No. 30 (2004) on discrimination against non-citizens, according to which measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and urges the State party, in accordance with article 2, paragraph 1 (c), of the Convention, to put an end to the National Entry and Exit Registration System (NEERS) [sic] and to eliminate other forms of racial profiling against Arabs, Muslims and South Asians.[29]

The U.S. government's response acknowledges that no progress had been made on enacting federal legislation to ban racial profiling.[30] The U.S. government's submission does not explain, however, that there was little public support from the executive branch for such legislation.[31] While Congress is responsible for passing laws, it is critical that the leaders of the executive branch call for and urge the passage of such important legislation. Sadly, such leadership has been lacking for several years.

The U.S. response also acknowledges the widespread criticism of the NSEERS program and seeks to justify governmental inaction by noting that the judicial branch continues to be available for those whose rights have been violated by the program. However, the U.S. submission fails to examine the ongoing ramifications of the program for individuals and families affected by the registration process.[32] Nor is there explanation of why the program is necessary or should be continued.

Insufficient Action Taken by Executive Branch Agencies

The U.S. response focuses on the actions of the executive branch – particularly the Department of Justice (DOJ) and the Department of Homeland Security (DHS) – to prevent and respond to incidences of racial profiling. Though the submission mentions four investigations launched by the Department of Justice since November of 2007, only one (Puerto Rico) involves racial profiling; and the submission includes no information beyond the opening of the investigations. The submission also fails to include any details about or results of the "numerous" investigations opened by DHS' Office for Civil Rights and Civil Liberties.

In addition, although the submission recognizes the authority of federal agencies to investigate "patterns or practices of violations" of racial profiling, the U.S. government omits any recent examples of racial profiling investigations leading to settlements.[33] The two settlements cited by the U.S. (reached in 1999 with the State of New Jersey and in 2000 with the Los Angeles Police Department) are now several years old, and have failed to effectively combat racial profiling.[34]

For example, since 2000, the Los Angeles Police Department (LAPD) has been under a federal consent decree to reform the Department by, among other things, eradicating the practice of racial profiling.[35] (People of color in the Los Angeles area have, for decades, been subject to harassment and intimidation by, and violence at the hands of, the LAPD; the Rodney King beating remains a particularly troubling example.)[36] Although the LAPD has made some progress in changing the culture within the Department, the data (gathered under the consent decree) continues to show evidence of ongoing racial discrimination and

Community members rally against police brutality in Hollywood, California, following the killing of Usman Chaudhry, an autistic young South Asian man shot several times by LAPD officers. Photo courtesy of the ACLU of Southern California; June 2008.

profiling inconsistent with the consent decree's prohibition of such discrimination.[37] As a result, the ACLU of Southern California is advocating for a three-year extension of the decree;[38] the LAPD, conversely, is advocating for its removal.[39]

Given the persistence of profiling in Los Angeles and the highly contested nature of the status of the consent decree, it is troubling that the U.S. government cites the decree as evidence of its "multi-faceted approach to combating racial profiling."[40] It is equally problematic that the U.S. government's treatment of the topic fails to discuss the fact that, though the consent decree includes a broad prohibition against discrimination and requires data collection and reporting, it lacks a specific requirement that corrective action be taken to address race-based disparities revealed in that data.

In the other case cited, the U.S. government's discussion of the federal consent decree in New Jersey raises similar questions and concerns. In fact, data in New Jersey reveal that, after ten years, African Americans now make up a *higher* percentage of stops along the southern portion of the New Jersey Turnpike than they did before the consent decree began.[41] Given the consent decree's monitoring structure (which the U.S. government does not mention), it is not surprising that racial profiling has not been eradicated in the state. Instead of analyzing traffic stop patterns, federal monitors looked at each stop individually to determine whether it was valid (and, since most people exceed the speed limit on the New Jersey Turnpike, there is a legitimate reason to stop virtually any driver).[42] As a result, the consent decree never truly addressed discriminatory police practices or

racial profiling at all. As the consent decree comes to a close, the New Jersey legislature is considering a bill that would permanently establish an independent monitor in the state executive branch to replace the federal monitor.[43]

In sum, despite clear evidence that racial profiling continues to be a problem for federal, state and local law enforcement agencies, the U.S. government has taken little action to investigate, prosecute or combat the practice.

The U.S. follow-up submission reiterates the importance of the Justice Department's 2003 *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, claiming that it is "binding on all federal law enforcement officers."[44] However, it is important to cite the guidance itself, which clearly falls short of ICERD standards, especially with regard to the absolute lack of enforceability:

> This guidance is intended only to improve the internal management of the executive branch. It is not intended to, and does not, create any right, benefit, trust, or responsibility, whether substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities, entities, officers, employees, or agents, or any person, nor does it create any right of review in an administrative, judicial or any other proceeding.[45]

In addition to failing to establish enforceable standards under which law enforcement agents can be held accountable, the guidance creates a significant loophole that allows for racial profiling for reasons of "national security," a term that can be deployed to justify a wide variety of unjust practices:

> In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.[46]

Importantly, the guidance is only for federal law enforcement and is not applicable to state and local law enforcement agencies, where many racial profiling violations occur. The federal government has imposed numerous requirements on state and local law enforcement in exchange for federal funding in many areas, including post-9/11 law enforcement measures, yet no effort has been made to require compliance with the guidance as a condition of this funding.

Failure to Address Forms and Effects of Gender-Specific Profiling

The U.S. follow-up submission ignores the concerns of several Committee members, including Professor Sicilianos, expressed during the review session on the U.S. government's periodic report to the Committee, about the persistence of racial profiling and police brutality in general within the United States, as well as with respect to the gender-specific forms and effects of racial profiling and police misconduct experienced by women of color and transgender people of color.[47]

In contravention of the Committee's General Recommendation XXV, the U.S. government has failed to keep racial profiling and police brutality statistics that are disaggregated by both race and gender, thus precluding a full assessment of the breadth and depth of the gender-specific impacts of the problem.[48] It has also precluded the use of the Department of Justice's pattern and practice jurisdiction to counter these trends at the federal, state, and local levels in any of the cases cited by the U.S. government in its follow up submission, or for that matter any other report.[49]

In contravention of the Committee's General Recommendation XXV, the U.S. government has failed to keep racial profiling and police brutality statistics that are disaggregated by both race and gender, thus precluding a full assessment of the breadth and depth of the gender-specific impacts of the problem.

Moreover, an exclusive focus on traffic stops fails to reveal racial disparities in stops, searches and arrests of women of color pedestrians, particularly in the context of profiling women of color as street-level "drug mules."[50] While this practice at the nation's airports is well documented by a 2000 General Accounting Office study, it also extends into streets and homes across the country.[51] Additionally, racial profiling of women of color as drug users has permeated delivery rooms across the nation, where pregnant women fitting the "profile" of drug users – young, poor, and Black – are drug-tested and sometimes subject to criminal charges.[52]

Current state and federal data collection systems also fail to capture racial profiling which takes place in gender-specific contexts. For example, police responses to domestic violence disproportionately lead to the arrest of African American and Latina women who are victims of domestic violence; to the policing of child abuse and neglect; and to the policing of pregnant women suspected of using controlled substances, which has almost exclusively targeted women of color.[53] Women of color, and African American, Latina, and Asian transgender women in particular, are also routinely profiled by police and subjected to stops, strip searches, and arbitrary arrest and detention as alleged sex workers, regardless of whether they are engaged in sex work at the time or involved in the trade at all.[54]

Current data collection requirements also fail to capture the particularly harmful consequences of racial profiling for women of color. Reports by women of color of sexual harassment, assault and rape by police officers who target them for traffic, drug or prostitution-related offenses are all too common.[55] Data on searches following police stops does not differentiate with respect to the type of search performed, thereby failing to capture patterns of overly-invasive and often abusive searches of women of color and transgender women of color flowing from racial profiling practices, particularly in the context of the "war on drugs" and the policing of sex work.[56]

Inadequate Action by the U.S. Department of Justice Civil Rights Division

The Criminal Section of the U.S. Department of Justice Civil Rights Division is insufficiently resourced and therefore unable, as a practical matter, to prosecute the number of cases of racial profiling, racially discriminatory use of excessive force, abuse, harassment, and false arrests which take place each year. Moreover, 18 U.S.C. § 242, the primary statutory vehicle for bringing criminal charges against law enforcement officers, requires proof that a law enforcement agent specifically intended to violate an individual's constitutional rights, rather than merely intend to commit the act(s) which results in rights violations.[57] "Even the specific intent to injure, or the reckless use of excessive force, without more, does not satisfy the requirements of § 242 . . . . There must exist an intention to punish or to prevent the exercise of constitutionally guaranteed rights, such as the right to vote, or to obtain equal protection of the law."[58] Moreover, an officer's belief that his or her conduct is reasonable under the circumstances is a sufficient defense to a charge under § 242.[59] The standard of proof of intentional racial discrimination under the statute is particularly high, in contravention of the Convention's definition of racial discrimination, which includes acts which have racially discriminatory effects.[60] As a result, few prosecutions for racially discriminatory law enforcement conduct are successfully brought under this statutory provision.[61]

Indeed, prosecutions for racially discriminatory police misconduct are the exception rather than the rule. The U.S. government cites to over 400 convictions obtained for "criminal misconduct" by public officials over almost a decade in a country with thousands of law enforcement agencies.[62] This represents a mere "drop in the bucket," in light of U.S. DOJ statistics indicating

Protestors rally against racial profiling in Canton, Mississippi. Photo courtesy of the ACLU of Mississippi; March 2008.

26,556 complaints alleging excessive force lodged against 59% of officers/agencies nationwide in 2002 alone.[63] Additionally, the U.S. government fails to quantify how many of the 400 "criminal misconduct" convictions of "public officials" were for acts of racially discriminatory police brutality. "Public officials" can encompass a broad range of government employees other than law enforcement officers and "criminal misconduct" can include theft, bribery or both, offenses that tend to give rise to a greater number of prosecutions than racially discriminatory use of excessive force or civil rights violations.[64]

The U.S. government asserts that the Department of Justice produces national statistics on contacts between police and the public.[65] It should be noted that the surveys referenced are randomly administered across the country, generating an average response that conceals the differences in law enforcement conduct between communities.[66] As a result, survey findings do not fully capture the wildly disparate realities of frequency, nature and outcomes of police contacts in communities of color disproportionately targeted by law enforcement agencies in the context of the "war on drugs," "quality of life" enforcement, "anti-gang" initiatives, and the "war on terror." Moreover, the surveys are based on a relatively small sample of the U.S. population: 51,000 people, or 0.0166% of the current population.[67]

Failure to Effectively Train Law Enforcement

Although the U.S. government's follow-up submission devotes considerable attention to training of law enforcement agencies, and to initiatives undertaken to address discrimination by law enforcement against Muslims, Arabs, and South Asians (post-9/11, in particular) nothing is said about the complete lack of national standards for training of law enforcement officers. The measures cited in the U.S. follow-up submission are neither comprehensive nor mandatory,[68] and, as a result, there is considerable variation in the type and depth of training received by local, state, and federal law enforcement agencies. Training is particularly lacking with respect to law enforcement interactions with women of color, in general, and transgender women of color, in particular.[69] Moreover, the prevalence of police abuse and misconduct appear to suggest that what training measures are in place are not effective.

Inaction on Problematic Federal Bureau of Investigation Guidelines

The U.S. follow-up submission acknowledges the serious concerns of many Members of Congress and advocacy groups about new guidelines (adopted in October 2008) regulating the domestic operations of the Federal Bureau of Investigation (FBI).[70] The follow-up submission states: "Although the guidelines maintain the status quo with respect to the use of race or ethnicity in investigations, they have been criticized by advocacy groups and members of Congress for not going far enough to eliminate racial profiling, particularly in national security investigations."[71] The Bush administration took no steps to address the concerns raised, and the guidelines are now operational. Recently, in response to concerns about the guidelines raised by Senator Russ Feingold during Attorney General Eric Holder's Senate confirmation hearings, Attorney General Holder committed to taking a "close look" at the guidelines early in his tenure to consider whether changes need to be made.[72] Thus far, the Obama administration has taken no further action.[73] It is imperative that new policies regarding the FBI guidelines and other law enforcement agency regulations be consistent with U.S. treaty obligations under ICERD and all other human rights commitments. See section 4 for additional information and concerns about the new FBI guidelines.

U.N. Special Rapporteur on Racism Concerned about Racial Profiling in the U.S.

Finally, it is significant to note that in May and June 2008, after the CERD review, the U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance visited the United States to conduct a formal country visit. In his report, recently presented to the U.N. Human Rights Council, the Special Rapporteur focused on racial profiling as one of his priority concerns, and made the following relevant recommendations:

> As a matter of urgency, the [U.S.] Government should clarify to law enforcement officials the obligation of equal treatment and, in particular, the prohibition of racial profiling. This process would benefit from the adoption by Congress of the End Racial Profiling Act. State Governments should also adopt comprehensive legislation prohibiting racial profiling.
>
> To monitor trends regarding racial profiling and treatment of minorities by law enforcement, federal, state and local governments should collect and publicize data about police stops and searches as well as instances of police abuse. Independent oversight bodies should be established within police agencies, with real authority to investigate complaints of human rights violations in general and racism in particular. Adequate resources should also be provided to train police and other law enforcement officials.[74]

The U.S. government should act swiftly to implement the Special Rapporteur's recommendations.

Montana Vista, Texas is a small community of mixed-status families where the local Sheriff's Department has terrorized community members. ACLU and local volunteers documented local human rights violations and took this photo as the Sheriff's Deputy questioned a Latino driver. Photo courtesy of Ray Ybarra; June 2006.

UPDATES TO RACIAL PROFILING CONCERNS ADDRESSED IN 2008 CERD REVIEW AND NEW CASES OF RACIAL PROFILING TO BRING TO CERD'S ATTENTION

A. FEDERAL POLICY AND NATIONAL ISSUES

In August 2004, the UN Committee on the Elimination of Racial Discrimination (CERD Committee) issued new guidelines clarifying the obligations of States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) regarding the human rights of non-citizens.[75] The Committee, which oversees compliance with ICERD and monitors discriminatory laws and practices in member states, issued General Recommendation XXX, addressing discrimination against non-citizens and establishing standards on the fundamental rights of non-citizens, underscoring the principle that non-citizens enjoy absolute and equivalent rights to protections from racial discrimination under international law.[76] Importantly, General Recommendation XXX addresses all groups of non-citizens, including lawful permanent residents, asylum seekers, refugees, and undocumented persons.[77] Additionally, the General Recommendation advises States parties to the ICERD to:

> Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.[78]

In 2005, the CERD Committee adopted General Comment XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system. In paragraph 20 of that document, the CERD Committee recognizes racial profiling by law enforcement as a violation of the treaty's obligations.[79]

Despite the clear guidance of international human rights law, the United States government has failed to meet its obligations under the ICERD, and racial profiling by law enforcement continues to be a significant problem at the federal, state and local levels.

Racial Profiling through 287(g) and Other ICE ACCESS Programs

Over the last seven years, the federal government has actively shifted significant responsibility for enforcement of civil immigration laws to state and local police and other state and local agencies. To support the collaboration with local law enforcement, the Department of Homeland Security (DHS), through its Immigration and Customs Enforcement (ICE) agency, established the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (also known as ICE ACCESS programs). The ICE ACCESS programs include Border Enforcement Security Task Forces; the Criminal Alien Program; the Fugitive Operations Teams; the Secure Communities program; and the Delegation of Immigration

NO EXIT
© Andy Singer
THE FIRST ILLEGAL IMMIGRANTS
NO GREEN CARDS? NO VISAS?? I'M SORRY... BUT WE NEED TO SEE SOME IDENTIFICATION.
SINGER
Courtesy of Andy Singer.

Authority – 287(g) program.[80] Each of these programs has raised concerns about racial profiling.

Perhaps the most well-known program of ICE-local police collaboration is the Delegation of Immigration Authority, or 287(g) program. Under this program, ICE enters into memoranda of understanding or agreement (MOU or MOA) with states and localities under Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g).[81] In relevant part, this provision empowers DHS to enter into written agreements with a state or any political subdivision of a state authorizing local law enforcement officers to perform immigration-related functions under certain circumstances and provided there is oversight, supervision and training of local officers by Immigration and Customs Enforcement (ICE).[82] As of May 2009 a total of sixty-six 287(g) MOAs have been signed in twenty-three states,[83] and approximately eighty applications to join the program are pending approval.[84] ICE's budget for the program has increased tenfold in the last two years, from $5.4 million in 2007 to $54.1 million in 2009.[85]

Enforcement of federal immigration law by local law enforcement is inherently problematic and tied to practices of racial profiling, as noted recently in ACLU testimony before Congress:

> Because a person is not visibly identifiable as being undocumented, the basic problem with local police enforcing immigration law is that police officers who are often not adequately trained, and in some cases not trained at all, in federal immigration enforcement will improperly rely on race or ethnicity as a proxy for undocumented status. In 287(g) jurisdictions, for example, state or local police with minimal training in immigration law are put on the street with a mandate to arrest "illegal aliens." The predictable and inevitable result is that any person who looks or sounds "foreign" is more likely to be stopped by police, and more likely to be arrested (rather than warned or cited or simply let go) when stopped.
>
> . . .
>
> The problem of racial profiling, however, is not limited to 287(g) field models . . . the federal government uses an array of other agreements to encourage local police to enforce immigration law. Racial profiling concerns therefore are equally present under jail-model MOUs or other jail-screening programs. Officers, for example, may selectively screen in the jails only those arrestees who appear to be

"Because a person is not visibly identifiable as being undocumented, the basic problem with local police enforcing immigration law is that police officers who are often not adequately trained, and in some cases not trained at all, in federal immigration enforcement will improperly rely on race or ethnicity as a proxy for undocumented status." —ACLU Testimony to Congress

> Latino or have Spanish surnames. Police officers may also be motivated to target Latinos for selective or pretextual arrests in order to run them through the booking process and attempt to identify undocumented immigrants among them.[86]

As such, immigration enforcement by local police raises grave concerns about racial profiling of Latinos and other racial minorities, and of both U.S. citizens and non-citizen immigrants. Although the overwhelming majority of Latinos in the United States are U.S. citizens or legal permanent residents[87] (and Latinos are expected to constitute more than twenty-five percent of the U.S. population by 2050),[88] Latinos have frequently been singled out for immigration stops and inquiries by local law enforcement. Such race and ethnic-based immigration enforcement imposes injustices on racial and ethnic minorities, specifically reinforcing the harmful perception that Latinos—U.S. citizens and non-citizens alike—are presumptively "illegal immigrants" and therefore not entitled to full and equal citizenship unless and until proven "legal."[89] Low-wage Latino immigrant workers are particularly threatened as are low-wage South Asian workers, who face an intersection of anti-immigrant hostility, employment abuse, and post-9/11-related discrimination.[90]

In addition to exacerbating pre-existing racial profiling in local communities, local police enforcement of the immigration laws under the 287(g) program and other related ICE ACCESS programs undermines the trust between the police and the communities that they serve. When local police function as immigration agents, the message is sent that some citizens do not deserve equal protection under the law. Fear, as opposed to trust, is created in Latino and other immigrant communities, and Latino U.S. citizen children with parents, who are either immigrants or citizens, may avoid coming in contact with police or any public officials (including school officials) out of concern that they, their parents or family members will be targeted by local enforcement because of their actual or perceived immigration status.[91] Latina and other immigrant women who are victims of domestic violence may fear interacting with the police because of their immigration status, or the status of their families, or even their abusers, and the consequences of that fear can leave them in dangerous and violent situations.[92] Respect and trust between law enforcement and communities of color are essential to successful police work.[93] It is for this reason that many police executives and police organizations have expressed concern that local police enforcement of the immigration laws has a "negative overall impact on public safety."[94]

Despite the significant problems associated with local police enforcement of immigration laws, ICE has not responded to, or monitored, complaints about the 287(g) program or other ICE ACCESS programs. The U.S. Government Accountability Office (GAO) recently reported that ICE lacks key internal controls for the implementation of the

287(g) program, even though the program has been in operation for approximately seven years.[95] The GAO report conclusively found that 287(g) program objectives have not been documented in any program-related materials; guidance on how and when to use program authority is inconsistent; guidance on how ICE officials are to supervise officers from participating agencies has not been created; data that participating agencies use to track and report to ICE has not been defined; and performance measures valuating progress toward program objectives have not been developed.[96] Without strong oversight, clear policies to ensure that stops and arrests are

> When local police function as immigration agents, the message is sent that some citizens do not deserve equal protection under the law....Latino U.S. citizen children...may avoid coming in contact with police or any public officials (including school officials) out of concern that they, their parents or family members will be targeted by local enforcement.

Community members outside the Durango jail in Phoenix, Arizona, protest the 287(g) program and the actions of Sheriff Joe Arpaio, which have devastated Latino communities. Photo courtesy of Mary Lunetta, ACLU of Arizona; February 2009.

undertaken in a fair manner, and genuine consequences for individuals and agencies that engage in profiling and undermine public safety, 287(g) and other ICE ACCESS programs will continue to lead to unlawful discrimination against Latinos and other racial minorities and enhance distrust between police and the immigrants and communities of color they serve.

Without strong oversight, clear policies to ensure that stops and arrests are undertaken in a fair manner, and genuine consequences for individuals and agencies that engage in profiling and undermine public safety, 287(g) and other ICE ACCESS programs will continue to lead to unlawful discrimination against Latinos and other racial minorities and enhance distrust between police and the immigrants and communities of color they serve.

Secure Communities is a new ICE program, launched in March 2008, which permits local jails to automatically run fingerprint checks against DHS databases, not just FBI databases, of arrestees during the booking process.[97] According to ICE, "[t]he technology enables local Law Enforcement Agencies (LEAs) to initiate an integrated records check of criminal history and immigration status for individuals in their custody. . . . When there is a fingerprint match in both systems, ICE and the LEA that encountered the individual are automatically notified, in parallel."[98] According to DHS, Secure Communities will respond to LEA inquiries at any time, day or night, and is not limited to criminal aliens; LEAs can apparently investigate any person in their custody.[99] Even though Secure Communities is expected to be fully implemented in all jails and prisons throughout the country by 2012,[100] the legal authority for the program is still dubious, as is its implementation and effect.[101]

The Secure Communities program has been criticized for creating an incentive for police to arrest people based on racial or ethnic profiling or for pretextual reasons so that immigration status can be checked.[102]

The Obama administration has taken note of the criticisms of these programs, including the report of the GAO. Since taking office, Homeland Security Secretary Janet Napolitano has ordered a review of the 287(g) program.[103] Thus far, however, instead of investigating methods of eliminating the ICE ACCESS programs as a result of the concerns raised by the GAO report, Secretary Napolitano has reportedly been evaluating methods of expediting additional agreements with state and local police forces.[104]

Racial Profiling Post-9/11

As noted in the December 2007 ACLU and the January 2008 RWG shadow reports to the CERD Committee, since the tragic events of 9/11, the United States government has subjected hundreds of men from (or appearing to be from) Muslim, Arab, or South Asian countries to racial profiling, unfair treatment and punishment, and arbitrary detention and investigation.[105] Without specific or material verification, individuals have been scrutinized based upon assumptions of their potential connection to alleged "terrorist activities."[106] Almost none of these men have been found to have any connection to terrorism and the law enforcement agencies who categorized the men as having "special interest" appear to have based many of these decisions on racial, ethnic, and religious profiling.[107] While in custody for months on end, some of the men were physically and psychologically brutalized and mistreated, and even still, after having been found to be innocent of the terrorist activity that they were suspected of, many of these men were deported.[108] We would respectfully refer the Committee to two ACLU reports that document the destructive impact that these human rights violations have had upon the individual families and broader communities that these men belonged to, as well as to a 2004 decision of the U.N. Working Group on Arbitrary Detention.[109]

NSEERS ("Special Registration")

In the wake of 9/11, the U.S. government has used immigration enforcement as a justification to target members of Muslim, Arab and South Asian communities for investigation, interrogation and sometimes deportation.[110] Though this tactic has been used in various ways, the most notorious is the National Security Entry-Exit Registration System (NSEERS).[111] The NSEERS program required certain non-immigrants from predominantly Muslim countries to register themselves at ports of entry and local immigration offices, and to be fingerprinted, photographed and questioned at length based on their countries of origin.[112] The U.S. government took the position that NSEERS did not constitute religious profiling, since it was based on national origin and eventually was to be expanded to all countries.[113] In reality, the program was never expanded past the original list and, although some parts of the program were suspended, other parts are still in place.[114]

After considering the report of the U.S. government and after listening to testimony of U.S. officials during the constructive dialogue, the Committee issued a recommendation to the U.S. government expressing concern over the National Security Entry-Exit Registration System (NSEERS). The recommendation states in relevant part:

> The Committee also draws the attention of the State party to its general recommendation no. 30 (2004) on discrimination against non-citizens, according to which measures taken in the fight against terrorism must not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and urges the

> State party, in accordance with article 2, paragraph 1 (c), of the Convention, to put an end to the National Entry and Exit Registration System (NEERS) [sic] and to eliminate other forms of racial profiling against Arabs, Muslims and South Asians.[115]

The CERD Committee recommendation was most appropriate. Unfortunately, victims who challenged the constitutionality of the NSEERS program have failed to win redress. In September 2008, in *Rajah et al. v. Mukasey*, four people placed in removal proceedings with orders of removal had their claims rejected by the Second Circuit Court of Appeals.[116] The court found, in relevant part, that the Immigration and Nationality Act provides statutory authorization for the NSEERS program, that the NSEERS program does not violate the equal protection clause of the U.S. Constitution and that petitioners had not endured 4th or 5th Amendment violations.[117]

More than seven years after its implementation, NSEERS continues to impact the lives of those individuals and communities subjected to it. It has led to the prevention of naturalization and to the deportation of individuals who failed to register, either because they were unaware of the registration requirement or because they were afraid to register after hearing stories of interrogations, detentions and deportations of friends, family and community members.[118] As a result, well-intentioned individuals who failed to comply with NSEERS due to a lack of knowledge or fear have been denied "adjustment of status" (green cards), and in some cases have been placed in removal proceedings for "willfully" failing to register.

> Abdul-Karim Nasser, a native of Morocco, and his wife Patricia Amy Stewart, an American citizen, have three U.S. citizen children together.[119] Nasser was not aware of the requirement for registration. Ms. Stewart filed an immediate relative petition on her husband's behalf on February 5, 2002, and on that same date Nasser filed an application for adjustment of status and work authorization.[120] Pursuant to his pending adjustment, Nasser appeared at a local DHS office on June 3, 2003 for the processing of his employment authorization application. At no point did DHS advise Nasser that he needed to register under NSEERS.[121] On January 19, 2006, Nasser underwent special registration as a condition of his pending application for adjustment of status.[122] On March 21, 2006, Nasser was denied adjustment of status and was found to have "willfully" violated NSEERS.[123] This has left Nasser in the difficult position of being ineligible to work because he has no legal status in the United States,[124] and has negatively impacted him and his family both emotionally and financially.[125]

Lastly, the federal government has failed to assess or address the impacts of the NSEERS program on transgender women who are citizens of affected countries and are present in the United States. Although such individuals may have completely transitioned to a female gender identity and live their lives entirely as women, it is unclear whether they are required to register under NSEERS in light of the fact that they were assigned a male identity at birth.[126] Moreover, some of their identity documents may still indicate that they are male as a result of obstacles to changing identity documents to reflect individuals' gender identity and expression in both the U.S. and overseas. This places transgender women from targeted

countries at risk of either being found to be non-compliant with the program and deported, or of having to disclose their transgender status in order to comply with the program. Both options can have profoundly adverse consequences for their safety.[127]

"Operation Front Line"

Despite the U.S. government's acknowledged obligation to provide relevant information to the Committee and its stated position that it has done so, there are significant examples of racial profiling at the federal level that have not been disclosed either as part of the U.S. government's 2007 report[128] or as part of the follow-up information provided to the Committee in January 2009.[129] A significant example is "Operation Front Line," a program whose existence was revealed by a recent Freedom of Information Act (FOIA) lawsuit by the American-Arab Anti-Discrimination Committee and Yale Law School's National Litigation Project.[130]

By its official description, Operation Front Line was designed to "detect, deter and disrupt terror operations" among immigrants during the months leading up to the presidential election in November 2004.[131] However, the documents obtained though the suit contained "damning evidence against the use of ethnic racial and religious profiling in counterterror operations."[132] Evidence suggests that the list of people who registered under NSEERS was used to identify people who were called in for interviews with Immigration and Customs Enforcement (ICE).[133]

An analysis of the data obtained from the Department of Homeland Security reveals that an astounding seventy-nine percent of the targets investigated were immigrants from Muslim-majority countries.[134] Moreover, foreign nationals from Muslim-majority countries were 1,280 times more likely to be targeted than similarly situated individuals from other countries.[135] Incredibly, not even one terrorism-related conviction resulted from the interviews conducted under this program. What did result, however, was an intense chilling effect on the free speech and association rights of the Muslim, Arab and South Asian communities targeted in advance of an already contentious presidential election.[136]

The Committee should request that the U.S. government explain why this information was not disclosed previously, that it reveal information on any similar racial profiling programs operated under the Bush administration, and that it highlight any steps taken by the Obama administration with respect to Operation Front Line.

FBI Investigations of Muslims

As part of the "war on terror," the Federal Bureau of Investigations (FBI) has continued to undertake problematic inquiries and investigations of members of Muslim communities, Muslim religious organizations (including mosques), and even Muslim charities.[137] Targeted individuals have been investigated at their places of employment, their homes, and their schools and universities, and have had their families, friends, classmates, and co-workers questioned and harassed.[138] These investigations have had a chilling effect on the civic participation of Arab, Muslim and South Asian individuals and communities, since many are afraid to attend their local mosques or get involved with Islamic organizations and events.[139]

Rarely do these investigations result in terrorism-related charges. Most cases have resulted in no charges being filed at all or with the filing of lesser charges such as immigration-related offenses, tax evasion or document fraud. As discussed elsewhere in this document, the creation of a "suspect community" seems to have been codified in the new FBI guidelines, allowing agents to consider race and religion when starting investigations.

For example, in February 2009, it was reported that the FBI had infiltrated several mosques in California, using cameras and other surveillance equipment to record hours of conversations in those mosques, as well as in restaurants and homes.[140] Local residents report that the surveillance has caused them to avoid the mosques and pray at home, avoid making charitable contributions – a fundamental tenet of the Muslim faith – and refrain from having conversations about political issues such as U.S. foreign policy.[141]

Use of Informants and Agent Provocateurs

Since 9/11, the FBI has increasingly used informants to infiltrate mosques and other places where Muslims gather.[142] A number of these informants have been paid large sums of money to elicit information about potential criminal or terrorist activity, which has led to charges of entrapment.[143] Some feel that the financial incentives cause these agents to exaggerate claims or instigate plots in order to show success.[144]

The following stories illustrate the troubling consequences of such practices on the part of the FBI:

> Nassem Khan, an informant who infiltrated a mosque in Lodi, California, recorded conversations with a young man named Hamid Hayat. These conversations raised questions of entrapment after Khan repeatedly tried to goad Hayat into attending a terror training camp.[145]

> Osama Eldawoody was instrumental in gaining a conviction against Shahawar Matin Siraj, a Pakistani immigrant convicted of a plot to bomb the New York City subway system.[146] While authorities describe Siraj as a violent terrorist in search of a plot, community members describe him as an impressionable youth who was playing along with a plot hatched by a man that he thought was his friend.[147]

Agency Recruitment of Muslims as Informants

The FBI has used several questionable and coercive tactics to recruit Muslims to serve as informants. These attempts have occurred directly through FBI agents or through questioning by other law enforcement agencies like Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP).[148] Attempts have also been made to recruit individuals who report suspicious activity to law enforcement.[149] Anecdotal evidence suggests that individuals who refused to cooperate were threatened or retaliated against.

The stories below tell the experiences of two individuals who were subject to such recruitment and retaliation:

> Terek Mehanna was first questioned by the FBI in 2005 and again in 2006, according to his attorney J. W. Carney, Jr. In April 2008, Carney says his client was approached again by the FBI, who told him that they would prosecute him for lying during his 2006 interview unless he cooperated with them as an informant. Mehanna refused and was arrested in November 2008 when getting ready to board a plane to Saudi Arabia.[150]

> In November, 2005, Yassine Ouassif, a 24-year-old Moroccan national with a green card, was stopped when reentering the U.S. from Canada. CBP questioned him at length and took possession of his green card and told him to contact a man named Dan, who turned out to be FBI counterterrorism agent Daniel Fliflet. According to Ouassif, the agent told him that if he cooperated with the FBI as an informant, they would help him get his green card back and bring his wife to the U.S. If not, they would deport him. Two weeks later at an immigration interview, after Ouassif refused to cooperate as an FBI informant, FBI officials recommended that he be deported. DHS officials released Ouassif citing lack of evidence of deportability.[151]

FBI Guidelines

In October 2008, former Attorney General Michael Mukasey and the Department of Justice under the Bush Administration released *The Attorney General's Guidelines for Domestic FBI Operations*.[152] While a small number of NGOs, including the ACLU, were invited by the Department of Justice to review and comment on the Guidelines during the drafting process, the final version lacks the changes requested by the ACLU and others, including members of Congress.[153] The new Guidelines went into effect on December 1, 2008.

The new Guidelines have several significant problems. Most notably, they open the door to abuse of power and racial profiling by allowing the FBI to open "assessments" without any factual predicate.[154] By calling their investigations "assessments," FBI agents can investigate any person they choose, provided it is done with the goal of preventing crime, protecting national security, or collecting foreign intelligence.[155] There is no requirement of a factual connection between the agent's authorizing purpose and the actual conduct of the individuals who are being investigated.[156] FBI agents can initiate "assessments" without any supervisory approval and without reporting to FBI headquarters or to the Department of Justice.[157]

Moreover, the new Guidelines do not require the FBI to keep records regarding when "assessments" are opened or closed, and "assessments" have no time limitation.[158] The FBI can even initiate an "assessment" if the agent determines that the person might make a good FBI informant.[159] Innocence does not protect people from being subjected to a wide range of intrusive investigative techniques including: the collection of information from online sources, including commercial

The new [FBI] Guidelines have several significant problems. Most notably, they open the door to abuse of power and racial profiling by allowing the FBI to open "assessments" without any factual predicate.

databases; the recruitment of informants who are then tasked to gather information about individuals under "assessment"; the use of FBI agents to surreptitiously gather information from friends and neighbors without revealing their true identity or true purpose for asking these questions; and the use of FBI agents to follow individuals under "assessment" day and night for as long as the agents deem necessary.[160]

Perhaps most troubling is that the new Guidelines will significantly increase racial profiling. Former Attorney General Mukasey stated that the Guidelines "will not alter the previous Department rules that forbid predicating an investigation simply based on somebody's race, religion, or exercise of First Amendment rights."[161] But, rather than eliminating racial profiling, the Guidelines actually encourage the profiling of people of color through the national security exceptions. Because the exceptions do not require legal proof of criminal suspicion, the U.S. has disproportionately targeted and will continue to target Arabs, Muslims and South Asians.[162] Despite the statements of Attorney General Holder, who said that ending racial profiling was a "priority" for the Obama administration and that profiling was "simply not good law enforcement,"[163] the Obama administration has not repealed these guidelines.

Profiling at Airports and Border Crossings

For Muslim, Arab and South Asian people who enter the United States, entry can come at a high cost for both citizens and non-citizens alike.[164] Muslims, Arabs and South Asians, including those assumed to be Muslim based on their appearance, are frequently pulled aside by Customs and Border Patrol (CBP) and questioned about their faith, friends, family, and even political opinions.[165] Travelers have reported their cell phones, computers, personal papers, business cards and books being taken and, many believe, copied by the CBP agents.[166] Even U.S. citizens have been threatened with referral to ICE.[167]

This unjust treatment is caused, in part, by a problematic CBP guidance. Released in July 2008, the CBP guidance on border searches of information contained in papers and electronic devices states, in part, that "[i]n the course of a border search, and absent individualized suspicion, officers can review and analyze the information transported by any individual attempting to enter, reenter, depart, pass through, or reside in the United States . . . ".[168] The guidance followed on the heels of the 2007 CBP decision to lower the basis for copying documents from a "probable cause" standard to a "reasonable suspicion" standard.[169]

This overly broad guidance gives agents at the border latitude to single out travelers based on their apparent or actual religion or ethnicity, and creates a higher bar for re-entry for U.S. citizens from Muslim, Arab and South Asian countries. Often, in order to travel abroad for business, pleasure or

Muslims, Arabs and South Asians are frequently pulled aside at airports and border crossings, forced to submit to lengthy and humiliating searches, and questioned about their faith, friends, family, and political opinions. Photo courtesy of vissago via Flickr with Creative Commons licensing; August 2008.

to see family, Muslims, Arabs, and South Asians are forced to submit to lengthy and humiliating searches and have their families, business contacts and personal papers subject to governmental scrutiny.[170] As a result, business travelers have reduced their trips abroad and individuals have left personal papers, cell phones, and laptops at home to avoid the intensive and unwarranted searches by CBP.

Many Muslim, Arab, and South Asian travelers have been told that their names are on government lists and cannot be cleared. Far from being mere inconveniences, these stops are intrusive and humiliating and interfere with citizens' rights to privacy and re-entry.[171]

The following stories illustrate the impact of these unfair practices on individuals and families:

> Fairuz Abdullah is a U.S. citizen and attorney from San Francisco.[172] In 2007, when returning from a vacation in Peru, she was detained and interrogated by CBP agents who referred her to immigration processing despite her having presented a valid U.S. passport. Federal agents repeatedly addressed her in Spanish (even though she had identified herself as a native speaker of English), denied her access to counsel, and threatened to confiscate her cell phone when she sought the advice of a lawyer.[173]

> Zakariya Reed is a firefighter, Gulf War veteran, and twenty-year member of the U.S. National Guard.[174] Reed has been repeatedly detained, searched and interrogated when reentering the U.S. from Canada, where he travels to visit family. Reed has been questioned about his associates, political ideology, and his reasons for converting to Islam. Reed has been handcuffed in front of his children, has had weapons pointed at him, and has been denied access to counsel. The racialized nature of the stops became abundantly clear when one federal agent came into the room where Reed was detained and exclaimed, "Is this the guy? But he's White!" before leaving the room. Even after Reed sought recourse through the Traveler Redress Inquiry Program (TRIP), submitted a Freedom of Information Act (FOIA) request to obtain his records, and worked with his Congressional Representative to resolve the problem, he continues to be stopped at the border.[175]

Religious Head Coverings and Air Travel

In August 2007, the Transportation Security Administration (TSA) released a series of new guidelines intended to serve as standard operating procedures for security screening at airports around the U.S.[176] These new screening procedures singled out Sikh turbans and Muslim head coverings to be screened with higher scrutiny, even though no evidence existed that these objects were being used to hide harmful or dangerous items.[177] The new procedures led to widespread profiling and abuse of Sikhs at airports where they were required to remove their turbans, have their turbans roughly patted down by Transportation Security Officers (TSO), and face additional screening procedures.[178]

After continuous negotiations with three Sikh organizations to combat the unclear, inconsistent, and unfair application of TSA operating procedures, a new set of options for screening Sikhs and their turbans was negotiated and issued by the TSA in October 2007.[179] Per these new guidelines, after being selected for screening at the discretion of a TSO, a Sikh was to be provided three options for screening his turban: (1) a private screening area or a puffer machine, if available; (2) a self pat-down of the turban followed by a swabbing of the fingers of the individual for chemical residue; or (3) a TSO pat-down of the turban.[180]

This policy, absent from the U.S. government's follow-up submission to the Committee, has been implemented with questionable success.[181] Sikhs have reported that wide-scale differences and inconsistencies exist between airports, that all three options are rarely given, and that the discretionary nature of screening procedures coupled with a lack of training has led to a failure to curtail abuses and profiling of Sikhs at airports.[182]

The stories of three individuals impacted by these TSA procedures are as follows:

> In August 2007, a Sikh passenger at the San Francisco International Airport was told to remove his turban and place it in the X-ray machine along with his luggage to be screened or he would not be allowed to board his flight.[183]

> In November 2008, a Sikh passenger at Boston Logan Airport was threatened with arrest if he did not remove his turban during secondary screening.[184]

Photo Courtesy of Alex Crawford; www.alexcrawfordphotography.com.

> In early 2009, a Sikh passenger at Oakland International Airport was told that secondary screening for the turban is mandatory and was subjected to secondary screening over thirty times during a two-month period of travel.[185]

Muslim women have faced similar profiling and discrimination. Because the federal government has not adequately publicized the existence of or trained TSA agents in its policy on "religious and cultural sensitivity," women who wear Muslim religious attire (including the *hijab* and other head coverings) have experienced profiling, harassment, and inappropriate and invasive searches.[186]

In 2006, the Council on American-Islamic Relations received eighty complaints of racial discrimination in the airport.[187] Some examples of the discrimination include:

> In November 2001, a Muslim woman was asked to remove her headscarf at an airport and taken to a room for a full body search even though the metal detector had not gone off when she went through it.[188]

> Shereen Hamed, a Muslim and Arab U.S. citizen from Rochester Hills, Michigan, was subjected to racial profiling at the Detroit Metro Airport on May 31, 2006. Shereen and her family members were required to pass through an additional security line, which consisted mostly of Muslims, Arabs, and South Asians, and were subjected to intense interrogation and humiliating pat-downs.[189]

Raed Jarrar was prevented from boarding his flight at John F. Kennedy Airport by JetBlue and a Transportation Security Administration official until he agreed to cover his t-shirt, which read "We Will Not Be Silent" in English and Arabic script. Photo courtesy of the ACLU.

JetBlue

A year and a half after the American Civil Liberties Union and New York Civil Liberties Union filed a federal lawsuit on behalf of Raed Jarrar, as noted in the ACLU's 2007 report to the CERD Committee,[190] the defendants—two Transportation Security Administration officials and JetBlue Airways—agreed to pay Jarrar $240,000 to settle his lawsuit.[191] Jarrar had brought legal claims alleging that defendants violated his constitutional and civil rights by discriminating against him based on his racial and ethnic background and his t-shirt, which read "We Will Not Be Silent" in Arabic and English script.[192]

Jarrar, an Iraqi-born architect, was treated differently from all other passengers waiting to board his JetBlue flight at John F. Kennedy Airport when the defendants made it clear that he would not be permitted to board until he covered his t-shirt.[193] JetBlue again singled Jarrar out for differential treatment when it moved him from his seat in the third row to the back of the airplane.[194] Jarrar alleged that these actions violated his constitutional rights to free speech and equal treatment under the law.[195] The settlement of Jarrar's claims for a landmark sum of $240,000 sends a clear message: airlines and government officials must not discriminate against passengers based on their race or the ethnic content of their speech.

AirTran 9

In January 2009, a large Muslim family traveling with a close friend was removed from an AirTran Airways flight after other passengers on the flight described a comment made by two members of the group as "suspicious."[196] Although the FBI cleared the nine Muslim passengers for travel and found that the group posed no security threat, and even after the group missed their original flight, AirTran still refused to book them on a later flight.[197] The incident unfolded as follows:

On January 1, 2009, brothers Kashif Irfan (an anesthesiologist) and Atif Irfan (a tax attorney) sought to travel with their sister and families from Washington D.C. to Orlando, FL on AirTran Flight 175.[198] Their friend, Abdul Aziz, a United States Library of Congress attorney, was also on the flight.[199] Five of the six adults in the group were of South Asian descent.[200] The women wore Islamic headscarves and the men were bearded.[201]

[O]rdinary, law-abiding people who are or appear to be Muslim, Sikh, Arab and South Asian continue to experience discrimination and differential treatment by airlines and government officials when they are engaging in air travel—even if the individuals do nothing to warrant heightened security scrutiny.

While boarding the plane, two members of the Irfan family had been casually speaking about the "safest place to sit on an airplane," discussing whether it was safer to sit close to the wings, the engine, the front or the back of the plane.[202] Another passenger overheard the conversation and reported it as "suspicious" to crew members, who notified federal marshals on board the aircraft,[203] who then required all passengers and crew to disembark and all baggage to be removed.[204]

When all other passengers were permitted to reboard the aircraft, the Irfan family (including their young children) was detained in the jet bridge, which connected the aircraft to the airport.[205] Aziz was also detained because he had been seen speaking to the Irfan family in the gate area.[206] The flight departed two hours behind schedule without the Irfan family or Aziz.[207]

After interviewing the Muslim passengers, the FBI determined that none of the members of the group posed a security threat.[208] However, when the Irfan family and Aziz attempted to rebook onto a later AirTran flight, they were refused.[209] Even after an FBI agent spoke directly to AirTran staff and communicated that the nine Muslim passengers had been officially cleared, AirTran still refused to rebook any member of the group.[210] All nine passengers, including the children, were forced to purchase new round-trip tickets on another airline in order to continue their trip to Orlando.[211]

Following the incident, AirTran issued a press release indicating that it did not re-book the Irfan family and Aziz "because the security concern had not been resolved and because one member of the group 'became irate and made inappropriate comments.'"[212] Three hours later, however, AirTran issued another press release expressing its "regret that the passengers on Flight 175 did not have a positive travel experience" and that the "issue escalated to the heightened security level it did."[213] It refunded the airfares of the nine passengers, but insisted that the steps taken were "necessary" and called for a need to recognize "that the security and the safety of our passengers is paramount and cannot be compromised."[214]

These incidents underscore that ordinary, law-abiding people who are or appear to be Muslim, Sikh, Arab and South Asian continue to experience discrimination and differential treatment by airlines and government officials when they are engaging in air travel—even if the individuals do nothing to warrant heightened security scrutiny.[215]

B. STATE UPDATES AND NEW CASES OF RACIAL PROFILING

Overview of State Legislative Action on Racial Profiling

The response of state legislatures to evidence of racial profiling by law enforcement agencies has been, with few exceptions, inaction and a series of half measures. Although there is considerable evidence that racial profiling is widespread, only half of U.S. states have enacted legislation addressing the practice.[216] The most common provisions in state racial profiling legislation are vague calls for law enforcement and other state agencies to establish policies prohibiting or combating racial profiling. Twenty-one of the twenty-five states that have enacted legislation have included such provisions,[217] although Tennessee's statute only "strongly encourages" law enforcement agencies to establish such a policy by 2010. Another twelve states have written express prohibitions of racial profiling into their state codes,[218] even though the practice is clearly already prohibited by the U.S. Constitution.[219]

States have also enacted statutes for monitoring the prevalence of racial profiling. Thirteen states have required the collection of demographic data at traffic stops.[220] Seven states have established oversight or advisory boards to study the data collected and make recommendations,[221] and another six require an annual evaluation of efforts to eliminate the practice.[222] Minnesota has established a grant program for installing video cameras on police vehicles[223] and Texas is studying such a program's feasibility.[224] These programs are essential tools for identifying and combating racial profiling, but they are of limited utility if not paired with strong enforcement mechanisms.

Fewer states have enacted procedures for actually enforcing the statutory and constitutional prohibition of racial profiling. Five states mandate discipline for officers found to be engaging in racial profiling[225] but only two (New Jersey[226] and Oklahoma[227]) have created criminal penalties. Ten states have established processes for people to register complaints of racial profiling[228] but only two[229] back up this process with a private right of action.

[A] number of states prohibit profiling only when a prohibited factor is the *sole* reason for the stop. This, in effect, permits officers to discriminate based on race so long as they can point to any other reasonably legitimate reason for making the stop.

Furthermore, state statutes are also limited by their narrow definitions of racial profiling. Many statutes are limited to profiling based on perceived race, ethnicity, and national origin and thus permit law enforcement officers to profile based on other categories, such as age, religion, gender, or sexual orientation. Also, a number of states prohibit profiling only when a prohibited factor is the *sole* reason for the stop. This, in effect, permits officers to discriminate based on race so long as they can point to any other reasonably legitimate reason for making the stop.

In paragraph 13 of the Concluding Observations, the Committee recommended "that the State party establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels."[230] Unfortunately, the U.S. government has still not coordinated its approach toward implementation at the state and local levels; moreover, the U.S. has failed to adequately report and provide information on the state and local levels and thus has not met its reporting requirements. As such, it is our hope that the Committee will find the following information useful as it considers the breadth and depth of racial profiling in the United States.

As a disclaimer, the following information on states is partial and is based primarily upon information provided by ACLU affiliates. What follows is not a comprehensive accounting of racial profiling in the whole country, or even in the respective states included, and is designed only to offer the Committee anecdotal updates and additional information for particular states:

ARIZONA

Data Reveals Racial Profiling by the Arizona Department of Public Safety

Pursuant to a 2006 settlement agreement in a class action lawsuit brought by the ACLU, the Arizona Department of Public Safety (DPS) is required to collect traffic stop data.[231] An April 2008 report released by the ACLU of Arizona analyzing the first year of data confirmed the prevalence of racial profiling in the state, revealing that African American and Latino drivers were 2.5 times more likely than white drivers to be searched after being stopped by the highway patrol, and Native

Maricopa County Sheriff Joe Arpaio has received local, national, and international attention for engaging in a broad campaign to intimidate and paint as "illegal" the entire Latino community through unjust traffic stops, neighborhood sweeps, raids and other egregious practices. Immigration protest in Phoenix, Arizona. Photo courtesy of Willie Stark; 2007.

American drivers were 3.25 times more likely to be searched, even though they were *less* likely to be found with contraband.[232] Minority groups, including African Americans, Latinos and Middle Easterners, were consistently stopped for longer periods of time than whites.[233] Since the report was released, DPS has agreed to limit the circumstances under which officers may conduct consent searches. A study commissioned by the agency itself analyzing an additional six months of data shows, however, that racial/ethnic disparities in the rates of searches, including consent searches, have not improved.[234]

Profiling of Immigrants in Maricopa County

The profiling of immigrants – facilitated by the local enforcement of federal immigration laws – is also a serious concern in Arizona. In particular, the Maricopa County Sheriff's Office, under the

Maricopa County Sheriff Joe Arpaio marched more than 200 almost exclusively Latino inmates, who he claimed were "illegal immigrants" (in fact some of them were legal residents), in chain gang formation from Durango jail to Maricopa County's Tent City jail. Before the march, Arpaio contacted the media, ensuring that the inmates would be publicly shamed. Photo courtesy of Mary Lunetta, ACLU of Arizona; February 2009.

direction of Joe Arpaio, has received local, national, and international attention for its practice of descending upon neighborhoods with high Latino populations and stopping cars for minor traffic violations in order to investigate the immigration statuses of the drivers and passengers.[235] In April 2008, in the most controversial of the neighborhood sweeps, Sheriff Arpaio saturated a small town of approximately 6,000 Yaqui Indians and Latinos outside of Phoenix with more than one hundred deputies, a volunteer posse, and a helicopter for two days, stopping residents and chasing them into their homes.[236] In the end, nine undocumented immigrants were arrested.[237] The community was so scarred by the event that families are still terrified to leave their homes when they see the Sheriff's patrol cars.[238] The Sheriff has also begun to conduct raids on area businesses that employ Latino workers. These actions have led to a disturbing number of U.S. citizens and legal residents of Hispanic descent being stopped, searched, arrested, and detained.[239]

These neighborhood sweeps and traffic stops are the subject of a class action lawsuit by residents who allege that deputies are engaging in racial profiling. The plaintiffs are Latino drivers and passengers who were unfairly stopped or subjected to selective treatment by deputies.[240] In part, because Maricopa County has the largest and most comprehensive 287(g) agreement with the federal government to designate local officers to perform immigration functions,[241] it has become an important example of the abuses that have been made possible by the wholesale failure of the federal government to supervise and monitor such agreements. In the absence of clear guidelines and strict controls for the 287(g) program, the agreements

■ Sheriff Arpaio saturated a small town of approximately 6,000 Yaqui Indians and Latinos outside of Phoenix with more than one hundred deputies, a volunteer posse, and a helicopter for two days, stopping residents and chasing them into their homes. In the end, nine undocumented immigrants were arrested. The community was so scarred by the event that families are still terrified to leave their homes when they see the Sheriff's patrol cars.

have given state and local politicians license to perpetrate an open campaign against immigrants and those perceived to be immigrants.

In addition to the profiling of drivers and neighborhoods, the Maricopa County Sheriff has engaged in a broad campaign to intimidate and paint as "illegal" the entire Latino community. For example, Sheriff Arpaio made international news in February 2009 when he marched more than 200 almost exclusively Latino inmates, who he claimed were "illegal immigrants" (in fact some of them were legal residents), in chain gang formation from one of the county jails to their own section in his Tent City jail.[242] Before the march, Arpaio contacted the media, ensuring that the inmates would be publicly shamed. He also announced that the inmates would be surrounded by an electric fence, alluding to the fence that separates Mexico from the United States, saying, "this is a fence they won't want to scale because they risk receiving quite a shock – literally."[243] In March 2009, in response to these actions, the Obama administration's Department of Justice announced that it was launching an investigation into Sheriff Arpaio and the Maricopa County Sheriff's Office based on "alleged patterns or practices of discriminatory police practices and unconstitutional searches and seizures . . . and on allegations of national origin discrimination[.]"[244]

ARKANSAS

Four local law enforcement agencies in Arkansas (those of the cities of Rogers and Springdale and the counties of Benton and Washington) currently participate in the 287(g) program, which permits local police to enforce immigration laws.[245] The granting of the authority to these jurisdictions has led to numerous problems with racial profiling, including: reports of Latinos being stopped and questioned about their immigration status; roadblocks and concentrations of police outside Latino-owned businesses and churches and predominately Latino areas; pretextual stops and arrests; reports of law enforcement officers threatening to call ICE and deport individuals and their families to extract witness testimony; disparate charges and sentences for Latino and non-Latino persons for false identification; criminal charges for having an Arkansas resident fishing license while undocumented; and countless complaints of abuse of Latinos in jail and in immigrant detention, including allegations of neglect, failure to provide proper medical and essential care, and intentional abuse.[246]

It is no surprise that increased law enforcement authority in these jurisdictions has led to increased profiling of Latino communities. The Mayor of Rogers, for instance, successfully ran for office in 1998 on a "zero tolerance" policy towards undocumented immigrants.[247] In March 2001,

■ Sheriff Tim Helder in Washington County, Arkansas, candidly admitted that with 287(g), "there's going to be collateral damage. If there's 19 people in there who could or could not be here illegally, they are going to be checked. Although those people might not be conducting criminal activity, they are going to get slammed up in the middle of an investigation."

Latino residents of northwest Arkansas sued the Rogers Police Department for unlawfully targeting Latinos for stops, searches, and investigations and for improper entanglement by local police in immigration enforcement in violation of the Fourth and Fourteenth Amendments.[248] Under federal court supervision, the City of Rogers implemented a general order prohibiting officers from engaging in profiling of persons based on race, national origin, citizenship, religion, ethnicity, age, gender or physical or mental disability for the purpose of initiating law enforcement action – except to determine whether a person matches a specific description of a particular suspect.[249] The city also agreed to prohibit police action against individuals based solely on their actual or perceived immigration statuses,[250] and to refrain from inquiring about immigration status solely for the purpose of investigating immigration violations.[251]

Despite this settlement in 2003, the City of Rogers continued to exhibit hostility towards Latino residents, considering an ordinance that would make it a crime to rent housing to or to employ undocumented persons.[252] When a similar ordinance was enjoined in Hazelton, PA, the Mayor of Rogers switched his focus to gaining 287(g) authority, saying, "If I'm successful in getting the program you probably won't want to be here if there is a chance you could have a deportation problem."[253]

With respect to legal residents being detained and activities investigated, Sheriff Tim Helder in Washington County, Arkansas, candidly admitted that with 287(g), "there's going to be collateral damage. If there's 19 people in there who could or could not be here illegally, they are going to be checked. Although those people might not be conducting criminal activity, they are going to get slammed up in the middle of an investigation."[254]

Profiling is also a problem in areas not under 287(g) agreements. Immigrant victims of violent crime in one such area were told by police that if they were undocumented and wished to press charges, they would be reported by police to ICE.[255] Other immigrants outside of 287(g) areas likewise report problems with racial profiling and improper questioning about their immigration statuses by police.[256] Police enforcement of immigration has led to an environment of fear and intimidation, where even victims have few places to turn for police protection.

CALIFORNIA (NORTHERN)

Racial Profiling in Antioch

In May 2007, two African American students at Deer Valley High School were expelled from school for running away from police officers who tried to cite them for blocking traffic while they walked through the parking lot of a shopping center.[257] The students' expulsions were upheld by the Contra Costa County Board of Education, notwithstanding that (1) neither student's

conduct constituted an expellable offense under the California Education Code, and (2) the district had no jurisdiction to expel the students based on an incident that occurred off-campus after school and was unrelated to any school activity. Moreover, the students' expulsion hearings were not conducted in conformity with the requirements of the California Education Code or federal and state due process requirements. The ACLU's investigation of this incident led to the discovery of numerous other incidents of highly questionable conduct by Antioch police officers and school officials, and the ACLU is now convinced that this incident is part of a larger pattern of profiling and racially discriminatory conduct on the part of the police department; the school district and has taken legal action on the students' behalf.[258]

An investigation conducted by Bay Area Legal Aid and Public Advocates regarding harassment of Section 8 tenants by the Antioch Police Department has revealed a similar pattern of discrimination.[259]

Racial Profiling in Sonoma County

On September 5, 2008, the ACLU of Northern California filed a complaint in the U.S. District Court for the Northern District of California on behalf of three individual plaintiffs and the Committee for Immigrant Rights of Sonoma County, a grassroots community organization.[260] The case, filed against Sonoma County, ICE, and several individual officers, alleges Fourth Amendment, due process, equal protection, and a number of statutory claims stemming from the Sonoma County Sheriff's practice of collaborating with ICE to arrest and detain young Latino men in the County jail based on suspected immigration status and without any criminal charges.[261] In addition to unlawful seizure and racial profiling claims, plaintiffs allege that the scheme unlawfully postpones notice of the detainees' rights to a hearing, counsel, and bond determination and challenges the validity of the federal regulation upon which the practice of holding arrestees in jail without criminal charges is based. The case seeks injunctive and declaratory relief, as well as damages for the three individual plaintiffs.[262] This case is currently in discovery and motions to dismiss filed by county, ICE, and federal defendants are pending.[263]

El Balazo ICE Raid

The ACLU Immigrants' Rights Project is currently working with the law firm of Morrison & Foerster LLP to terminate immigration removal proceedings for twenty-five Latino workers who were arrested, in violation of their constitutional rights, during a raid at eleven El Balazo *taquerias* throughout the San Francisco Bay area. All of the locations were raided on the same day, and the workers argue that ICE officers did not have individualized reasonable suspicion to arrest all of the workers and therefore violated their rights under the Fourth Amendment of the U.S. Constitution. Workers and advocates believe that the workers were targeted because of their race and/or ethnic appearance.

CALIFORNIA (SOUTHERN)

Racial Profiling in Los Angeles

In August 2008, the ACLU of Southern California released an analysis, prepared by economist and Yale University Professor Ian Ayres, of the data collected through the federal consent decree over the Los Angeles Police Department (LAPD).[264]

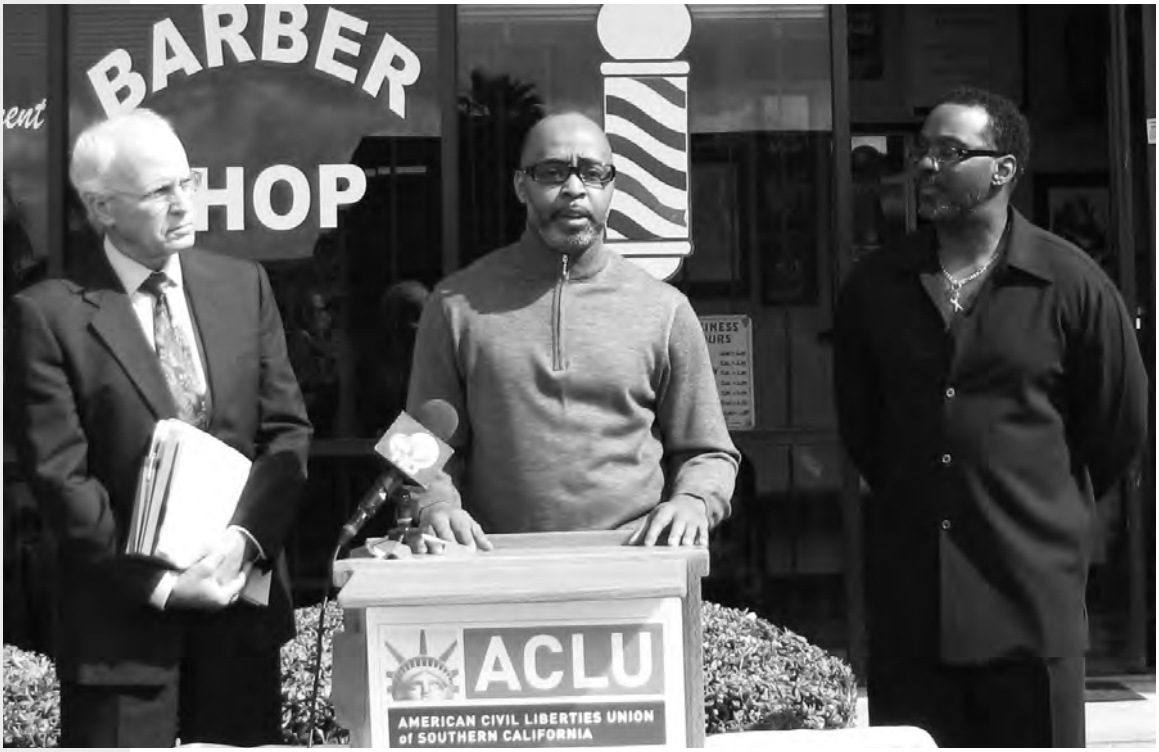
Prof. Ayres found statistically significant disparities in the rates at which Blacks and Latinos in Los Angeles were stopped, frisked, searched and arrested, and found that these disparities were not justified by local crime rates or by any other legitimate policing rationale evident from LAPD's extensive data.[265]

The ACLU of Southern California has also worked to ensure that LAPD's counterterrorism efforts do not rely on racial or religious profiling. The ACLU and other advocates successfully halted a program announced by the LAPD in November 2007 that would have "mapped" the city's Muslim population—a project that would have focused largely on communities of Arab and Middle Eastern descent.[266] The ACLU has been in discussions with the LAPD to ensure that subsequent counterterrorism efforts steer clear of racial profiling practices.

Also in 2009, the ACLU of Southern California settled racial profiling claims against the Los Angeles County Sheriff's Department on behalf of nineteen Black and Latino men who were detained on their community college campus and humiliated in front of their professors and peers. The young men were held for longer than one hour in an ostensible drug sting that yielded no evidence of drug activity. The settlement provided for a strengthened definition of racial profiling for the LA County Sheriff's department and a retraining for sheriffs involved in campus patrols.[267]

African American Barbershops

In April 2009, the ACLU of Southern California filed a lawsuit on behalf of three African American barbers in Moreno Valley, California, challenging a series of unlawful searches that primarily



Ronald Jones (center) and Kevon Gordon (right) were among several African American barbershop owners victimized by racially targeted, warrantless raids by Moreno Valley police. Photo courtesy of the ACLU of Southern California; April 2009.

targeted African American barbershops for health and business "inspections." During these "inspections," local police rushed into stores with guns and bullet-proof vests opening drawers, interrogating customers and barbers, and conducting far more intrusive investigation than were required to identify health or business violations.[268]

Immigration Raid Challenges

Also in 2008 and 2009, the ACLU of Southern California won two cases challenging a Southern California immigration raid in which the government sent armed agents to block workplace exits and question employees for hours while denying them water and food, without reasonable suspicion that the workers were in the U.S. illegally. In the first, a federal court ordered the government to halt its interrogations of workers arrested in the raid because the government was refusing to allow the workers to appear with attorneys as part of the settlement in the case.[269] In the second, an immigration judge dismissed the case against a worker because the government arrested him without cause and detained him under deplorable conditions.[270]

The ACLU of Southern California continues, with the law firm Morrison & Foerster LLP, to litigate a case against the Department of Homeland Security, the County of Los Angeles, and individual officers on behalf of a cognitively impaired United States citizen whom the Department of Homeland Security unlawfully deported to Mexico after refusing to believe, because of his

Maria Carbajal (center) cries as she recounts the human rights violations experienced by her son, Peter Guzman, who was illegally deported and abandoned in Tijuana, Mexico. Guzman was improperly deported from an L.A. County jail, despite clear evidence that he was a U.S. citizen, and spent nearly three months lost in Mexico while family members desperately searched for him. Photo courtesy of the ACLU of Southern California; February 2008.

skin color and language skills, that the citizen could be a United States citizen.[271]

CONNECTICUT

In East Haven, Connecticut – where the Latino population has almost quadrupled over the past twenty years – Latino merchants and residents have been subjected to racially-motivated police abuse and harassment.[272] The East Haven police department has a history of allegations of use of excessive force against people of color, most notably the 1997 shooting and killing of Malik Jones, an unarmed African American teenager.[273]

The most recent accusations suggest that East Haven police have intimidated and abused Latinos, some of whom have allegedly been beaten in police custody; others have been victimized during racially-motivated traffic stops. In addition, the police have allegedly used discriminatory language and retaliated against Latinos who have reported their stories to the media. As a result, many Latino residents have been afraid to report stories of abuse.[274]

The abuse and harassment of the Latino community rose to the media's attention when Rev. James Manship, the white pastor of the St. Rose of Lima Church in New Haven, Connecticut, was arrested for videotaping police officers as they were removing decorations from a Hispanic-owned food store. Rev. Manship was released from custody, but used the incident to shine a light on the unjust policies of racial profiling and harassment by the East Haven police department. Rev. Manship appears to have found irony in the situation, stating, "(i)t took a white, gringo priest getting arrested to bring attention to this."[275]

Subsequently, students at Yale Law School and community members filed a complaint with the United States Department of Justice alleging that the East Haven police had a pattern and practice of violence and brutality against Latino residents of East Haven. The complaint also alleges custodial beatings and racially biased traffic stops, racist language and verbal abuse, and retaliatory conduct against Latino residents who have made complaints about the police or cooperated with media outlets.[276]

GEORGIA

Profiling of Immigrants

In Georgia, three counties (Cobb, Whitfield, and Hall) have entered into 287(g) agreements with ICE in the past two years.[277] Gwinnett County has applied for a 287(g) agreement and the application is still pending.[278]

There are serious allegations of racial profiling in the above-mentioned counties, especially in the context of traffic stops. The ACLU of Georgia has received several complaints about pretextual stops in Gwinnett County, for example, where Latino drivers are pulled over for reasons that are not clear and then are arrested for driving without licenses (undocumented immigrants are prohibited from obtaining driver's licenses in Georgia).[279] Though complaints have come largely from Latino drivers, Gwinnett County has large Asian and African immigrant populations as well, and it is likely that these communities are similarly victimized by this form of racial profiling.

Per a law passed in 2007 by the Georgia legislature, the punishment for a first offense of driving without a license is a sentence of two days in jail, in addition to a fine. Confinement in jail provides

"Operation Meth Merchant" racially profiled Indian immigrant merchants and shop workers in northwest Georgia. As a result of this unjust targeting, Indian immigrant workers and their communities were economically and psychologically devastated and families were torn apart. Photo courtesy of Deepali Gokhale; January 2006.

deputized law enforcement with the opportunity to check a detainee's immigration status and, in the cases of an undocumented detainee, turn that individual over to ICE. In an apparent attempt to fast-track the deportations of immigrants and expedite Gwinnett County's entrance into a 287(g) agreement, the Gwinnett County Sherriff's Department partnered with ICE to investigate the immigration statuses of everyone held at the county jail over a 26-day period in January and February 2009. Nine hundred and fifteen foreign-born individuals were flagged for deportation by ICE officials, 226 of whom were charged with driving without licenses, the most prevalent offense in the group.[280]

Racial Profiling of Immigrants from India

Lastly, we respectfully refer the Committee to two ACLU reports that document the destructive impact of "Operation Meth Merchant" in Georgia. This initiative, conducted by a Drug Enforcement Administration (DEA)-led regional anti-drug task force, employed suspected methamphetamine users as "confidential informants" to target local South Asian merchants and shop workers in six counties in northwest Georgia.[281] As a result of the discriminatory practices employed in this law enforcement initiative, 44 of the 49 individuals arrested and charged were immigrants from India, many with the last name "Patel," and 23 of 24 stores investigated were South Asian-owned.[282] Evidence shows that workers and shop owners were specifically targeted based on race, ethnicity,

ACLU of Illinois plaintiff Akif Rahman. Photo courtesy of the ACLU of Illinois.

"All of us want to be safe from terrorism. The price of that safety must not, however, be that innocent Americans are repeatedly detained, handcuffed, guarded and questioned for hours when simply trying to re-enter their own country." —Akif Rahman

immigration status and/or English proficiency.[283] As a result of this initiative, Indian immigrants in these counties have been economically and psychologically devastated,[284] families have been torn apart due to the detention and deportation of their relatives and the broader impact of the racial profiling on the larger communities has been severe.[285]

ILLINOIS

Border Detentions of Arab and Muslim Travelers

The FBI's Terror Screening Center maintains a list of every person who, according to the U.S. government, has "any nexus" to terrorism. The government has adopted policies and practices of misidentification (i.e., mistaking non-listed people for listed people) and over-classification (i.e., assigning listed people a classification that makes them appear dangerous when they are not). As a result, many innocent U.S. citizens are repeatedly detained for unreasonably lengthy periods of time when they seek to reenter the U.S. after foreign travel.[286] Many others are subjected to additional harms, including drawn guns, handcuffing, body searches, and document seizure. The victims of this policy are largely Muslim, Arab, and South Asian.

The ACLU of Illinois filed a lawsuit challenging these abusive border inspections resulting from the federal government's defective watch-list.[287] The plaintiffs are nine U.S. citizens and one permanent resident – including three doctors, three business owners, and one pharmacist – who have no connection to terror-related activity. All ten plaintiffs are of South Asian or Middle Eastern descent, and most are Muslim. Akif Rahman, the suit's named plaintiff, gave testimony at a NGO briefing for the CERD Committee in February of 2008. Rahman, who has been detained, interrogated, and humiliated on several occasions while trying to return home to the U.S., articulated the situation to the Committee as follows: "All of us want to be safe from terrorism. The price of that safety must not, however, be that innocent Americans are repeatedly detained, handcuffed, guarded and questioned for hours when simply trying to re-enter their own country."[288] A critical factual issue in the case is whether the individual plaintiffs are included in the watch-list. Unfortunately, the government has refused to disclose this information, asserting that the information falls within the controversial "state secrets privilege." In April 2008, a U.S. Magistrate Judge rejected the government's argument, and ordered disclosure of this information.[289] The government filed objections to this order with the U.S. District Judge, and the ACLU is now awaiting a ruling.

Consent Searches of Black and Hispanic Motorists

For years, minority communities in Illinois have complained about racial profiling by traffic patrol officers. In response, the ACLU of Illinois led an effort to pass the Illinois Traffic Stops Statistics Act ("Study Act") in 2003. The Study Act, sponsored by then-Illinois State Senator Barack Obama,[290] mandates collection of data about all traffic stops, and statistical analysis of that data to detect and deter any bias-based policing.[291]

The Study Act focuses on so-called "consent searches," which occur when police officers lack suspicion of criminal wrongdoing but nonetheless ask for permission to search. Because such searches typically rest on the officer's subjective "hunch," consent searches are inherently susceptible to bias, conscious or unconscious. The Study Act data demonstrate that approximately 91% of motorists, including motorists of all races, grant such consent when asked – indicating that the "consent" is not truly voluntary.[292] This data is unsurprising given the coercive nature of the setting: individuals are in one-on-one encounters with armed officers, many do not know they have a right to refuse the search, and some justifiably fear the consequences of refusing.

The Study Act data clearly demonstrate that consent searches have a substantial racially disparate impact. Black and Hispanic motorists are more than twice as likely as white motorists to be subjected to consent searches,[293] yet white motorists are twice as likely to be found with contraband as a result of these searches.[294] In July 2008, the ACLU of Illinois published a report documenting this racial disparity, and – standing with several other civil rights organizations – called for the abolition of consent searches.[295]

LOUISIANA

In 2008, the ACLU of Louisiana released *Unequal Under the Law: Racial Profiling in Louisiana*, which examined arrests and bookings in three Louisiana parishes (St. Tammany Parish in southeastern Louisiana, Avoyelles Parish in central Louisiana, and De Soto Parish in northwestern Louisiana) during the first three months of 2007.[296] The study found that in every town, city and parish examined, people of color were arrested at higher rates than their representation in the population. In the worst areas, African Americans were found to be two or three times as likely to be arrested as whites.[297]

The ACLU report also documents several individual accounts of racial profiling and police abuse. It tells the story, for example, of Bunkie resident Gary Fields, who was given a severe electric shock with a Taser after police, who came to his residence on a civil matter, kicked in the door to his house.[298]

Based on the information that the ACLU gathered and at the ACLU's request, the St. Tammany Parish Sheriff's department has voluntarily agreed to keep records of the race of individuals stopped for traffic violations to prevent racial profiling in the future. The ACLU of Louisiana hopes to achieve legislation requiring the collection of racial and ethnic demographic data in all traffic stops.

In February 2009, several months after the release of the ACLU report, Bernard Monroe, an elderly African American man, was shot and killed by police on the front porch of his home in Homer, Louisiana, near the Arkansas border. According to witnesses, two white police officers came to Monroe's house looking for his son, and then shot the unarmed Monroe and planted a gun next to his body. Members of the Homer community

"If I see three or four young Black men walking down the street, I have to stop them and check their names.... I want them to be afraid every time they see the police that they might get arrested." —Homer, Louisiana police chief

identified this killing as part of a larger pattern of harassment of African Americans. The vice president of the Homer NAACP commented that "[p]eople [in Homer] are afraid of the police . . . . They harass Black people, they stop people for no reason and rough them up without charging them with anything."[299] These allegations are not surprising, given the comments made by the Homer police chief, who is white, about his strategy for policing African American neighborhoods: "If I see three or four young Black men walking down the street, I have to stop them and check their names…. I want them to be afraid every time they see the police that they might get arrested."[300] The ACLU of Louisiana is working with the Homer community to examine arrest data from the area and to evaluate strategies to improve conditions for local residents.

MARYLAND

After more than a decade of fighting for justice on behalf of individuals who were racially profiled on Interstate 95 (I-95) in Maryland, the ACLU of Maryland and the ACLU Racial Justice Program reached a landmark settlement with the Maryland State Police (MSP) in 2008 to end a longstanding "driving while Black" lawsuit. The agreement provided substantial damages to the individual plaintiffs, a requirement that the MSP retain an independent consultant to assess its progress towards eliminating the practice of racial profiling, and a joint statement by the parties condemning racial profiling and highlighting the importance of taking preventative action against the practice in the future.[301]

The lawsuit was filed in 1998 after evidence showed a continuing pattern and practice of discrimination by MSP's troopers, in violation of an agreement reached in an earlier lawsuit in 1995.[302] Plaintiffs in the latter case alleged that there still existed large disparities between whites and non-whites in traffic stops and searches by the MSP. People of color were stopped and searched much more often, even though the MSP did not find drugs on them any more frequently than when searching whites. In 2003, a consent decree was reached, resolving the injunctive part of the lawsuit, where the MSP agreed to improve the process for motorists to file racial profiling complaints and to thoroughly investigate all such complaints.[303] The consent decree also required ongoing data collection; a review of the training protocols to no longer encourage racial profiling; greater supervision of troopers and monitoring for "red flags"; the installation of video-cameras on as many patrol cars as feasible; the publication of a "complaint/commendation" brochure; and the creation of a police-citizens panel to recommend additional reforms.[304]

Even after the settlement in 2008, the ACLU of Maryland and the Maryland NAACP continue to have concerns about racial profiling by the Maryland State Police. Unfortunately, since 2003, racial disparities in searches have continued. The 2008 data shows that about 70% of those searched on I-95 were people of color (45% African American, 15% Hispanic and 9% other) and 30% were white. These percentages are almost exactly the same as they were in 2002, the year prior to the 2003 consent decree.[305]

Kenneth Jeffries, pictured above with his wife and daughters, was racially profiled by the Maryland State Police in 1995. In April 2008, a landmark settlement was reached in the ACLU's "Driving While Black" lawsuit with the Maryland State Police. Photo courtesy of the ACLU of Maryland.

In 2007, the ACLU and NAACP filed a public information request to obtain the investigative records created in connection with the racial profiling complaints filed since 2003. The MSP refuses to turn over the documents, even in redacted form, arguing that the files are "personnel records" exempt from disclosure. After the ACLU and NAACP filed a lawsuit to force release of the records, a judge ruled that the records should be disclosed. Again, rather than turn over the records, the MSP has appealed the ruling, and the ACLU and NAACP continue to fight the persistent and pernicious problem of racial profiling.[306]

MASSACHUSETTS

Flying While Brown

In 2003, John Cerquiera was removed from an American Airlines flight at Logan Airport, questioned by Massachusetts State Troopers, and ultimately refused service even after being cleared by police.[307] Of Portuguese descent, he was described in the district court trial as possessing a color and physical appearance "similar to that of individuals who are Arab, Middle Eastern or South Asian." On the plane, he sat next to two men whom he did not know, but who were also of Middle Eastern appearance and who were also removed from the plane. A flight attendant reported they had accents and "Arabic names" (they were Israeli).

In January 2007, a jury awarded Cerquiera $400,000 in compensatory and punitive damages. In early January 2008, however, a three-judge panel of the U.S. Court of Appeals for the First Circuit overturned the jury verdict.[308] The appeals court found the U.S. district court had given erroneous instructions to the jury and that "race or ethnic origin of a passenger may, depending on context, be relevant information in the total mix of information raising concerns that transport of a passenger 'might be' inimical to safety." The court of appeals also argued that a federal statute giving airlines the discretion to remove passengers for safety reasons immunizes airlines from liability under federal civil rights laws.

The Public Citizen Litigation Group filed a petition for rehearing by the entire court, arguing that "the panel's conclusion that racial profiling is a legitimate security measure is unprecedented."[309] On February 29, 2009 the full court denied the petition and also issued an "opinion errata" removing the entire paragraph containing the sentence about race or ethnic origin quoted above. The U.S. Supreme Court let the lower court's ruling stand.

In another case of airport profiling, in December 2007, former ACLU attorney King Downing won a lawsuit against the Massachusetts Port Authority stemming from his illegal detention at Logan International Airport in October 2003.[310] Downing, an African American Harvard-educated lawyer, testified at the trial that he was stopped for questioning by state police troopers after simply using a phone on his way out of Logan Airport on the morning of October 16, 2003. According to Downing, police demanded to see his identification and travel documents, which he was under no obligation to provide. After initially being told to leave the airport, Downing was then prevented from leaving and was surrounded by five state troopers and told that he was under arrest. Although the police had no reason to stop him, Downing was detained for forty minutes until he finally acceded to police demands for his identification and travel papers. The jury found that the police had unlawfully detained Downing because they had detained him without reasonable suspicion to believe he had committed any crime.[311]

Immigration Raids

Immigration raids have continued in Massachusetts during the last two years. Over 100 individuals have been arrested in raids in the cities of Lowell and Fall River and in the suburbs of Boston. Many of these raids have occurred not only at local businesses, but also at the private homes of families.[312] While immigration officials tout many of the raids as targeting criminals and gang members, the methods used to target individuals include outdated and overbroad police and ICE databases. If agents do not find the targeted individual at the place where they are looking, there are reports that they arrest others in the general area. These so-called "collateral" arrests are problematic because racial and ethnic profiling can play a large role as agents often question and arrest individuals they believe to be undocumented immigrants based on race, language, or other immutable characteristics.[313]

Traffic Stops

Since the 2007 report to the CERD Committee, in order to address the ongoing issue of racial profiling in traffic stops, the ACLU of Massachusetts has been working with other organizations to push for legislation that would require that police collect traffic stop data on the race, ethnicity, and

Vigil and Procession for Justice and Civil Rights, Los Angeles, California. Photo courtesy of Korean Resource Center 민족학교 via Flickr with Creative Commons licensing; May 2007.

gender of motorists in all traffic stops, that this data be analyzed, and that annual reports be made public.[314]

MICHIGAN

Profiling by Detroit Police

Even after complaints about arrests of peaceful protesters at MacKenzie High School in 2006, Detroit police continue to harass public school students. On March 5, 2009, a battalion of Detroit Public Schools police officers and Detroit police conducted a hallway sweep at Central High School.[315] At the conclusion of their operation, they had arrested 49 young people (almost all African American) who were in the corridors and charged them with "loitering."[316] According to student reports, students were forced to remain in a kneeling position with their hands behind their heads for as long as two hours, and their requests to call parents were denied. At least two of the arrested students contend that they were en route to register for college entrance testing on the instructions of the principal. According to media reports, the police vowed to conduct similar operations in the future at other schools.[317] The

... African American, Latino and American Indian drivers were all stopped and searched by law enforcement at greater rates than white drivers, though contraband was found more frequently among white drivers. If all drivers had been stopped at the same rates, the study concluded, approximately 18,800 fewer African Americans, 5,800 fewer Latinos and 22,500 more whites would have been stopped ...

ACLU and cooperating counsel will be representing two of the students in their criminal cases. When those cases are resolved, civil litigation is planned.

Ware v. Detroit

The ACLU of Michigan also represented Elvis Ware, a 36-year-old African-American veteran of Operation Desert Storm, in a lawsuit against Detroit police officers who detained him illegally and conducted a bare-handed search of his genitals and anal area in a public parking lot.[318] The two officers have been accused of conducting similar searches of a number of young men of African descent in southwest Detroit.[319] The case, *Ware v. Detroit*, was settled earlier this year for a monetary payment to Ware and for an agreement by the City that all officers on the force will be given instructions on proper search procedures over the course of a three month period.[320] Other victims of these officers who are represented by other counsel have cases that remain pending.

MINNESOTA

In 2001, as a result of advocacy by a racial profiling task force that included the ACLU of Minnesota, the Minnesota legislature passed § 626.951, providing for a statewide racial profiling study.[321] Sixty-five jurisdictions participated in the study, and an analysis of the data by the Council on Crime and Justice and the Institute on Race and Poverty found significant evidence of racial profiling across the state.[322] According to the study, African American, Latino and American Indian drivers were all stopped and searched by law enforcement at greater rates than white drivers, though contraband was found more frequently among white drivers. If all drivers had been stopped at the same rates, the study concluded, approximately 18,800 fewer African Americans, 5,800 fewer Latinos and 22,500 more whites would have been stopped in the 65 jurisdictions in 2002.[323]

Because this study only analyzed one year of data and included only the sixty-five jurisdictions that volunteered to participate, the ACLU of Minnesota drafted and promoted the introduction of a new bill in February 2009 to build on the work begun by the legislature in 2001. The bill requires law enforcement officers to record the race of every individual they stop and that the Minnesota Police Officers Standards and Training (POST) Board hire an outside expert to analyze the data for patterns of racial profiling once a year

and present the findings to the governor, the legislature and the public.[324]

MISSISSIPPI

In May 2009, a Hinds County Sheriff's Department deputy pulled over Hiran Medina, a dark-skinned Latino man who was driving through Mississippi on his way from Texas to Georgia.[325] Medina consented when the deputy asked if he could search the vehicle. When the deputy discovered nearly $5,000 cash in the vehicle, he handcuffed Medina and told him that he was seizing the money. The deputy gave no explanation for the seizure and gave Medina a forfeiture notice, explaining if Medina failed to sue the county within thirty days, the money would be forfeited to the Sheriff's Department. Medina later recounted that the deputies on the scene laughed with each other about seizing the money. The deputy eventually released Medina.

The ACLU and Medina spoke openly to local media about the incident. Initially, the Sheriff's department defended its actions, claiming Medina had been stopped because he crossed the center line of the highway—a typically subjective reason given by law enforcement for racial profiling stops—and that the money had been seized because it smelled of marijuana (no drugs were found in Medina's vehicle).[326] Within a few days of the ACLU of Mississippi's advocacy, the Sheriff's Department agreed to return Medina's money and pay the incidental costs he had incurred while trying to resolve the incident, but only if Medina would sign a release form agreeing not to sue the department.[327] Medina ultimately signed the form.

MISSOURI

Racial profiling is a serious problem in African American, Muslim and Latino communities in Missouri. In response to generations of profiling and abuse by police throughout north St. Louis, the ACLU of Eastern Missouri launched Project Vigilant to monitor and combat instances of profiling and abuse.[328] Incidents include the following:

> An African American juvenile was chased down and shot multiple times while lying prone in the street in front of witnesses in spite of being unarmed and not threatening the officers that shot him.[329] Although he survived, he is permanently injured.

In 2007, the ACLU of Eastern Missouri launched the Muslim Rights Task Force in response to a number of complaints brought to the ACLU's attention by members of the Muslim community, including individuals being stopped in their communities for questioning by police and being visited at their places of employment to be questioned by federal authorities. Two instances include the following:

> A store owned and frequented by members of the Somali community in south St. Louis was reportedly raided by FBI agents; the raid came just a few weeks after FBI agents had visited the store asking for an opportunity to reach out to and establish a relationship with Somali Muslims in the area.[330]

> A Muslim Rights Task Force member was detained with his wife and small children for hours at an airport after they were taken off the plane for a scheduled return trip to St. Louis.[331]

Racial profiling of Latino immigrants, who have increasingly become targets for harassment and police abuse, is also on the rise. The ACLU of Eastern Missouri is currently representing a legal immigrant, stopped without probable cause (for an ordinance violation that did not actually exist) and then transported to an ICE holding facility.[332] The ACLU has received other reports of similar abuse of immigrants by police.

NEW JERSEY

Cassandra Jetter-Ivey, et al. v. Newark Police Department, et al.

On the night of June 14, 2008, Tony Ivey Jr. (then 13 years old), Faheem Loyal (then 15 years old) and their football coach, Kelvin Lamar James, were pulled over and abused by several Newark police officers.[333] The two African American teenagers and the African American man were pulled out of the car in the rain at gunpoint and held with guns pointed at them while police conducted a search of their persons and their vehicle. When James stated that the officers' search of his car violated his rights, he was told by an officer in obscene, threatening language that he and the two boys with him didn't have any rights and that the police could do what they want and "had no rules."[334] The coach and his two players had committed no crimes, and a thorough search of James' car turned up only football equipment.

One of the most troubling aspects of this case was the handling of the Internal Affairs complaint filed by Tony Ivey's mother, Cassandra Jetter-Ivey, about the matter. The complaint was initially lost, then not properly followed up on; at one point, Jetter-Ivey was told by an officer that the complaint was transferred to the gang unit because the incident involved three Black youths.[335] To this day, the families have never received a response to their complaint.[336]

On April 23, 2009 the ACLU of New Jersey filed *Cassandra Jetter-Ivey, et al. v. Newark Police Department, et al.* alleging that the police officers' actions violated the students' and coach's right to be free from unlawful searches and unlawful detention and to equal treatment, and violated their rights under the New Jersey Civil Rights Act and the New Jersey Law Against Discrimination.[337] The lawsuit demands that Newark takes all steps necessary to establish proper training and supervision with respect to searches and detentions, unlawful discrimination, and the proper handling of complaints. It also seeks damages for the unlawful actions taken by the police against the students and coach.

Misuse of Immigration Inquiry Rule

In 2007, New Jersey Attorney General Anne Milgram issued a directive instructing local police to inquire about the immigration statuses of individuals arrested for indictable offenses or driving under the influence and to report to ICE those they believe are undocumented.[338] Police are not permitted, however, to inquire about the immigration statuses of witnesses, crime victims, or other individuals seeking police assistance.[339]

Despite these limitations, many New Jersey police are questioning Latino drivers, passengers, pedestrians and even victims about their statuses, according to a Seton Hall Law School study.[340] Many are reported to federal immigration authorities, and some are even jailed for days without criminal charges. Within six months of Attorney General Milgram's directive, 10,000 individuals – including a large number of legal residents and U.S. citizens – had been referred to ICE; only

1,417 were ultimately charged with immigration violations.[341]

The Seton Hall study, which analyzes sixty-eight cases, includes the story of a woman who was threatened with referral to ICE by police who came to her home in response to her domestic violence call, and the story of a man who was detained for sixteen days and then turned over to immigration agents after he went to the police station to report a lost passport. [342]

NEW MEXICO

Profiling of Immigrants

In September 2007, the Otero County Sheriff's Department conducted a series of immigration sweeps in the southern New Mexico town of Chaparral. Sheriffs' deputies raided homes without search warrants, interrogated families without evidence of criminal activity, and targeted households on the basis of race and ethnicity.[343] Landmark settlements with the Sheriff's Department to address civil rights violations during the sweeps resulted in revised operational procedures. The new procedures aim to ensure that the rights of all Latinos living in the county will be protected and that they will not become the targets of immigration-related investigations and detentions without justification.[344]

Despite the settlements, the use of local law enforcement to enforce federal immigration laws remains prevalent in New Mexico. Roswell, New Mexico seems to be an epicenter of abuse.[345] Many Latino residents have complained of unfair profiling practices and harassment by local police about immigration status, and others report being pulled over for seemingly routine traffic stops, such as broken taillights.[346] In a recent letter to the Department of Justice and the New Mexico Attorney General, the League of United Latin American Citizens asserted that Roswell police regularly require Latinos who are stopped or questioned, and even those who ask for police assistance, to produce documents verifying their citizenship status.[347]

Positive Action by the New Mexico Legislature

There have been some positive responses to this widespread problem. The New Mexico legislature took an important step in 2009, passing the Prohibition of Profiling Act.[348] The Act prohibits profiling practices during routine or spontaneous investigatory activity, as well as profiling by race, ethnicity, color, national origin, language, gender, gender identity, sexual orientation, political affiliation, religion, physical or mental disability or serious medical condition. Under the new statute, law enforcement agencies shall: (1) maintain written policies and procedures and provide training to law enforcement officers during orientation and at least once every two years; (2) maintain complaint procedures that provide for complaint investigation, that provide for appropriate disciplinary measures including mediation or other restorative justice measures, that supply forms for submitting complaints, and that allow complaints to be submitted in person, by U.S. mail, fax or e-mail, by phone, and anonymously or by a third party; (3) publish Profiling Prohibition policies and procedures; and (4) provide redacted copies of complaints to the Attorney General.[349]

The Attorney General will have independent oversight and will develop procedures for receiving complaints and maintaining records of complaints.[350]

[T]he NYCLU filed suit against the NYPD on behalf of a man of South Asian descent who was stopped twenty one times at subway checkpoints in less than three years. The odds of this happening according to a strict numerical formula are approximately 1 in 165 million.

Profiling of African Americans at the Arizona/ New Mexico Border

On April 20, 2009, the ACLU of New Mexico sued the State of New Mexico, the Department of Public Safety's Motor Vehicle Division, and various state police officers for racially profiling an African American man at the Lordsburg point of entry, near the Arizona and New Mexico border.[351] The plaintiff, Curtis Blackwell, is a long haul trucker who, on August 15, 2008, had his truck stopped and searched by New Mexico State Police. The officers accused Blackwell of being under the influence of narcotics or alcohol, even though Blackwell passed every sobriety test given to him. As a result of this ordeal, Blackwell's truck was impounded for over twenty-four hours at the point of entry. Evidence suggests that Blackwell, as well as other African American long haul truckers, have been regularly stopped and detained at this point of entry simply because they are African American. The case was filed in the U.S. District Court for the District of New Mexico and brings claims for equal protection, substantive and procedural due process, and various state tort law claims.[352]

NEW YORK

Sharp Rise in Profiling in New York

2006 stop-and-frisk data from the New York Police Department (NYPD) reveals that police are stopping an increasing number of people on city streets, the vast majority of whom are African American or Latino, and that an overwhelming number of those stopped – as many as 90% – are neither arrested nor issued subpoenas.[353]

After reviewing the data and concluding that a full analysis of NYPD stop-and-frisk activity required access to the Department's computerized database, the NYCLU filed a Freedom of Information Law request for the database. The NYPD denied the request, and the NYCLU then filed suit in November 2007.[354] In May 2008, a court ordered the NYPD to produce the database to the NYCLU, which it did in September 2008 after abandoning its appeal.[355] The NYCLU continues to analyze the database and additional information about NYPD stop-and-frisk practices and to push for Department reforms.

Profiling in the Subway

In the aftermath of the July 2005 bombings in the London transit system, the NYPD began searching the bags of select riders entering the New York City subway system. Riders subject to search were selected according to a numerical formula (for instance, every tenth person). Because the NYPD has in place no system to assure that riders are in

fact being picked according to the formula and because the NYPD bars its officers from recording the race of those stopped, the NYCLU long has been concerned about the potential for racial profiling.

In February 2009, the NYCLU filed suit against the NYPD on behalf of a man of South Asian descent who was stopped twenty one times at subway checkpoints in less than three years.[356] The odds of this happening according to a strict numerical formula are approximately 1 in 165 million.[357] This case was settled in June 2009.[358]

problems for the Latino community. For example, Alamance County Sheriff Terry Johnson, in reference to Mexicans, stated, "[t]heir values are a lot different—their morals—than what we have here. In Mexico, there's nothing wrong with having sex with a 12, 13-year-old girl . . . . They do a lot of drinking down in Mexico."[361] Johnson County Sheriff Steve Bizzell recently vocalized his views about immigrants, stating that they are "breeding like rabbits" and they "rape, rob and murder American citizens." He also described Mexicans as "trashy."[362] These racially biased statements, made by strong proponents of the 287(g) program, contribute to concerns about racial profiling in counties with 287(g) agreements.

■ The [North Carolina] State Highway Patrol set up roadblocks to check licenses in places where Latinos shopped, lived, and worshipped.... Police have arrested people at schools and libraries and during recreational events.

NORTH CAROLINA

Profiling Latinos for Driving Without Licenses and Other Minor Offenses

North Carolina has seen a dramatic influx of 287(g) and Secure Communities programs throughout the past few years.[359] North Carolina data for current 287(g) counties shows that an overwhelming number of people stopped by police are arrested for traffic offenses.[360] The ACLU of North Carolina is investigating allegations that this focus on traffic offenses has led to increased racial profiling of the Latino community in North Carolina.

Discriminatory attitudes toward immigrants, as indicated by racially hostile comments about Latino immigrants made by some law enforcement agency personnel, are causing further

Many of the allegations of racial profiling have come from Alamance County, located between Raleigh and Greensboro, where a general lack of transparency and confusion about who can targeted under the 287(g) program set the stage for controversy around the program and erosion of trust between law enforcement and local immigrants.[363] When Section 287(g) was presented to the public in 2006, Sheriff's office personnel assured residents that they would be targeting for deportation people who commit violent crimes, as opposed to people who commit lesser infractions such as driving without a license.[364] Their assurances were supported by language on the U.S. Department of Homeland Security website, which describes how the program gives local and state officers "necessary resources and authority to pursue investigations relating to violent crimes, human smuggling, gang/organized

In 2008, Rhode Island's Governor issued an executive order encouraging local police departments to assist in the enforcement of federal immigration law, which community groups say has only exacerbated the problem of racial profiling in the state...The executive minister of the Rhode Island State Council of Churches has said that "[t]here are people living in basements in fear, afraid to go out to the grocery store."

crime activity, sexual-related offenses, narcotics smuggling and money laundering."[365]

After the program began, however, it became clear that the majority of those being processed under the 287(g) program were traffic offenders. The State Highway Patrol set up roadblocks to check licenses in places where Latinos shopped, lived, and worshipped. For example, of more than 170 checkpoints in Alamance and Orange counties, about 30 have been conducted outside Buckhorn market on a Saturday or Sunday mornings, when Latino shoppers arrive by the hundreds.[366] Police have arrested people at schools and libraries and during recreational events.[367] In August 2008, five immigrants were arrested and later deported for fishing without a license on the Haw River.[368] Victims of crime also have been deported.[369] Given that the program was being carried out in a very different manner than the sheriff's office had promised the general public, trust between immigrants and law enforcement quickly disintegrated.

RHODE ISLAND

Racial profiling in Rhode Island continues unabated. Earlier independent analyses of three years worth of traffic stops data from all police departments throughout the state uniformly found that African Americans and Latinos were much more likely to be stopped by police and much more likely to be searched once stopped, even though whites were more likely to be found with contraband.[370] A recent follow-up study of Rhode Island state police data revealed no change. The study found a pattern of "racial and/or ethnic differences" among motor vehicle stops and searches by the state police.[371] Perhaps most disturbingly (though not surprisingly), state police officials simply refuse to accept the findings and continue to deny that any problem exists.[372]

In 2008, Rhode Island's Governor issued an executive order encouraging local police departments to assist in the enforcement of federal immigration law, which community groups say has only exacerbated the problem of racial profiling in the state.[373] A state panel has been charged with monitoring the order. Members of the panel, which includes representatives from government, law enforcement and business, as well as religious leaders and community advocates, have said that misunderstandings about the order among immigrant communities and misinterpretations of the order by police have created widespread fear

among immigrants in the state.[374] The executive minister of the Rhode Island State Council of Churches has said that "[t]here are people living in basements in fear, afraid to go out to the grocery store."[375] The ACLU of Rhode Island has also seen an increase in complaints from Latinos since the order was issued.

As a result, more than two dozen organizations are pushing for the passage of legislation designed to prohibit some of the police practices and policies that the groups believe encourage racial profiling. Among other things, the bill – vigorously opposed by the state Attorney General and police chiefs – places restrictions on police activity during traffic stops, reestablishes traffic stop data collection, requires that 287(g) and other ICE agreements and any related policies or procedures to be a matter of public record, and restricts the use of so-called "consent searches" on juveniles.[376]

TENNESSEE

Racial Profiling in Jackson

In Jackson, Tennessee, police routinely stop, interview, and often photograph people as part of what they benignly label "field interviews."[377] During the stops, officers record personal information such as birth dates, social security numbers, and contact information on "field cards." The cards are kept on file with the police irrespective of whether the subjects of the interviews become suspects in police investigations. Though the population of Jackson is forty-two percent African American, a local newspaper's cursory review of field cards dated 2004 to mid-2005 indicates that seventy percent of the cards obtained were for African American men and women.[378]

The local police chief claims that the cards are created when officers have "reasonable suspicion to believe a crime has occurred, [or] is about to occur or is investigating a crime."[379] Anecdotal evidence suggests otherwise. One African American college student, who was the subject of a field interview and contacted the ACLU of Tennessee as a result, states that he was stopped while walking down the sidewalk to visit his grandmother. The police then followed him onto the porch of his grandmother's house and subjected him and five other men and women who were visiting to field interviews, saying that if the individuals did not release their personal information they would be arrested.[380]

In November 2008, the ACLU of Tennessee launched the Justice in Jackson Campaign to combat racial profiling by law enforcement. The goal of the project is to examine the extent and prevalence of racial profiling in Jackson, increase public awareness about the issue, and share "know your rights" information with the targeted communities. The Campaign has interviewed over fifty Jackson residents of different ages and professions and held a town hall meeting in the community. A report and analysis of the key findings is forthcoming.

287(g) Implementation in Nashville

The ACLU of Tennessee is examining the implementation of the 287(g) program by the Davidson County Sheriff's Department, which serves the city of Nashville. Preliminary research indicates that the program, which was implemented in spring 2007, is leading to differential treatment of individuals by law enforcement based upon race and ethnicity. While the Metro Nashville Police Department (an entity separate from the Sheriff's Department) does not have a formal agreement

with ICE, preliminary data obtained by the ACLU indicates that the Sheriff's Department's 287(g) program motivates Nashville police officers to treat the individuals they stop for minor infractions differently based on race and ethnicity.[381]

Conversations with advocates and attorneys also indicate that the local police are arresting rather than issuing citations to people in order to process them through the 287(g) program. The ACLU of Tennessee has also collected police reports and statistics from the Metro Criminal Justice Planning Commission for 2006-07 in an effort to determine the extent to which a person's perceived national origin is a factor in an officer's decision to arrest or to issue a citation, and is planning to issue a report analyzing the impact of the 287(g) program on law enforcement practices.[382]

TEXAS

Border Security

Since at least 2005, a succession of border security efforts have been created and funded with the stated goal of keeping Texans "safe."[383] These efforts have consistently been based on the premise that decreasing criminal activity in the border region would protect all Texans. However, most, if not all, of these efforts have resulted in the use of racial profiling techniques by local law

U.S. Border Patrol in Arizona. Photo courtesy of AA7JC via Flickr with Creative Commons licensing; August 2008.

enforcement. The Mexican Consulate in Dallas reported that, as a result of one of these programs, termed "Operation Wrangler," there was a surge in detentions of undocumented immigrants.[384] Thirty-seven of forty-four detainees interviewed by the Mexican Consulate reported they had been racially profiled by local law enforcement after being pulled over for traffic violations.[385] Another initiative, "Operation Border Star," created incentives to produce arrests instead of investigations and furthered racial profiling practices. In March 2009, the ACLU of Texas' report, "Operation Border Star: Wasted Millions and Missed Opportunities", was followed by a state auditor's report indicating that some of the "crime-fighting tools" had never even arrived at their intended destinations.[386] It seems that this huge influx of investment has not made Texans any "safer," but has instead resulted in increased racial profiling.

Profiling and Theft in Tenaha

Local police departments in Texas also continue to practice racial profiling in a variety of other ways. A recent example comes from Tenaha, a town of less than 2,000 people in East Texas located on the highway leading to casino gambling destinations in Louisiana. Recent reporting has suggested that Tenaha police have been pulling over motorists, a disproportionate number of whom are African American, and offering them the choice of voluntarily signing over their belongings to the town or being charged with money laundering or other serious crimes.[387] In a two year period, more than 140 people have been pulled over in this manner and stripped of their cars, cash, jewelry, and other valuables in instances that can only be characterized as highway robbery by the police.[388] A civil suit has been filed,[389] and the state Senate has passed a bill to right this wrong; the bill, which would require police to go before judges before attempting to seize property, is now pending in the House.[390]

Positive Action to Combat Racial Profiling

There have also been some positive developments that will help to prevent racial profiling in Texas in the future. Earlier this year, both the Chief of Police of El Paso (Gregory K. Alan) and the Sheriff of El Paso County (Richard D. Wiles) wrote letters to United States Representative John Conyers stating their opposition to local law enforcement entering into 287(g) agreements.[391] Both Chief Alan and Sheriff Wiles took the position that local law enforcement should not be engaged in the enforcement of federal immigration law. Sheriff Wiles also testified before the United States Senate Committee on the Judiciary Subcommittee on Immigration, Border Security and Citizenship and stated:

> While Chief of Police in El Paso, I was a member of the Major Cities Chiefs Association. This organization is comprised of the leaders of the largest sixty-four law enforcement agencies (local and county) in the United States and Canada. I was one of nine members of an immigration subcommittee that ultimately made recommendations to the full Association, which were adopted in June 2006 . . . . The general recommendation of the Major Cities Chiefs Association was that local law enforcement should not be engaged in the enforcement of federal immigration law.[392]

Native Americans and people who appear to be Hispanic have been approached on the streets and on buses and asked to prove their immigration status. Agents have parked in front of Catholic churches and followed parishioners after Spanish language masses. Agents have also entered Mexican grocery stores and asked "who wants to go to Mexico today?"

WASHINGTON STATE

Abuses by Customs and Border Protection Agents

For years, the water border between Washington State and Canada (the Olympic Peninsula area) was served by four Customs and Border Protection (CBP) agents who were primarily assigned to search passengers and vehicles coming into the United States on the ferry in Port Angeles. In 2008, CBP received funding to increase the number of CBP agents patrolling the Peninsula to as many as forty-five.[393] Given the minimal amount of work needed to patrol the Port of Entry at Port Angeles, these new agents – trained on the southern border – have begun to use "southern border tactics" of racial profiling and harassment against the residents of the Peninsula. People who drive trucks or vans that look like the kinds of vehicles driven by migrant workers have been stopped and detained without probable cause.[394] Native Americans and people who appear to be Hispanic have been approached on the streets and on buses and asked to prove their immigration status. Agents have parked in front of Catholic churches and followed parishioners after Spanish language masses. Agents have also entered Mexican grocery stores and asked "who wants to go to Mexico today?"[395]

Racial Profiling by Police

The ACLU of Washington filed amicus briefs in two cases involving racial profiling by the police.

State v. Lee: Seattle police stopped and searched two African American men driving in Beacon Hill after the men were seen speaking to a female pedestrian; when police approached her, she claimed the men asked her if she wanted to smoke crack and showed her a pipe.[396] The ACLU filed a brief urging the court to apply the two-prong state constitution test when evaluating an informant's tip used to support a warrantless traffic stop. The brief discusses why the two-prong test is an important safeguard against police misconduct, including racial profiling and improper detentions, arrests and searches.

State v. Xiong: While attempting to execute an arrest warrant for Kheng Xiong, officers detained his brother, Bee Xiong, a passenger in a car parked at Kheng's residence.[397] Bee Xiong did not have identification, but truthfully told the officers his name and that Kheng was his older brother. He showed the officers his arm, which has a "B" tattooed on it. The officers tried to figure out how to identify Bee; they claim they were unable to determine whether they had the right person from the photo. When asked by the police about a bulge in his pocket, Bee truthfully said he didn't have a weapon. An officer pulled the object out of Bee's

Protestors in Oswego, New York object to border patrol practices following a raid. Photo courtesy of Richard Vallejo via Flickr with Creative Commons licensing; October 2008.

pocket (over Bee's objection, and with Bee handcuffed) to determine whether it was a weapon and discovered a glass pipe with methamphetamine residue. At roughly the same time, Bee's mother identified Bee. The officer later testified that he would not have frisked Bee if his mother had identified him prior to the frisk.

The ACLU amicus brief addressed the lack of justification for the initial detention, especially the strong possibility that it was based on race. Though the State has the obligation of proving the mistaken identity and resulting detention had a reasonable basis, it failed to introduce any of the key evidence that could support that proposition. Neither the ACLU of Washington nor the courts have any evidence to use to determine whether the misidentification was reasonable. In the absence of such information – all under control of the State of Washington – the presumption should be in favor of the defendant. The brief discussed the harm done by racial profiling and how law enforcement and the courts cannot just assume that two Asian individuals look alike. The brief also addressed the disturbing fact that there was evidence that the individuals (in this instance, brothers) did not actually look alike, further heightening the concerns of racism.

On September 11, 2008, the Washington Supreme Court issued a unanimous decision reversing the Court of Appeals and ruling that the police lacked

justification to conduct a second frisk for weapons after the defendant had already been handcuffed and frisked once.[398]

WEST VIRGINIA

Data Reveal Widespread Racial Profiling

A February 2009 study conducted in West Virginia, pursuant to a Racial Profiling Data Collection Act,[399] indicates that Hispanic drivers in the state are 1.48 times more likely and Black drivers are 1.64 times more likely to be stopped than white drivers.[400] Once stopped, non-whites are more likely than whites to be arrested, despite a contraband hit rate significantly lower than that for white drivers. Even more alarmingly, the supporting data for these findings were self-reported by law enforcement agencies across the state.[401] This year the ACLU of West Virginia will implement its Campaign to End Racial Profiling in an effort to address the findings of this study.

Lee v. City of South Charleston

In May 2006, South Charleston, West Virginia city police stopped and searched a young African American driver on the pretext that he did not use his turn signals as required.[402] The policeman had followed the young man for about two miles from a 7-Eleven parking lot where he had stopped to observe another traffic stop of an acquaintance. The young man's refusal to consent to a search of his vehicle led to his roadside strip-search in broad daylight in addition to a search of his vehicle. Neither produced contraband or illegal materials. The ACLU of West Virginia filed a suit, which argues that racial profiling motivated the incident, on behalf of the young man.[403] The case is pending.

Protestors rally against racial profiling in Canton, Mississippi. Photo courtesy of the ACLU of Mississippi; March 2008.

RECOMMENDATIONS TO THE UNITED STATES

The ACLU and the Rights Working Group respectfully refer the Committee to the recommendations relating to racial profiling made by the organizations in their original shadow reports, submitted for the February 2008 review of the U.S. report. These recommendations, which have not yet been implemented by the U.S. government, are thus still relevant. A copy of the recommendations from the ACLU's original report is submitted as Annex A and a copy of the recommendations from RWG's original report is submitted as Annex B.

In light of the additional information provided in this current report, the ACLU and RWG also make the following recommendations:

LEGISLATIVE ACTION

- Congress should pass the End Racial Profiling Act (ERPA) without exemptions for immigration enforcement.

- Congress should ensure that the enactment of ERPA includes the collection of racial profiling data disaggregated by both race and sex. This data should extend beyond traffic stops to include street-based law enforcement interactions and interactions resulting from allegations of domestic violence, child abuse and neglect, and transmission of drugs to a minor by pregnant women. Data collection with respect to searches should indicate the type of search performed, the reason for the search, and whether the search resulted in the discovery of weapons or contraband.

- The federal government should reform the U.S. Commission on Civil Rights (USCCR) consistent with the recommendations made by the Leadership Conference on Civil Rights in the March 2009 report "Restoring the Conscience of a Nation." The reformed USCCR should include a strong human rights mandate to enforce ICERD and other relevant human rights commitments.

EXECUTIVE ACTION

- The President should issue an executive order prohibiting racial profiling by federal officers and banning law enforcement practices that disproportionately target people for investigation and enforcement based on race, ethnicity, national origin, sex or religion. The order should include a mandate that federal agencies collect data on hit rates for stops and searches and that such data be disaggregated by category.

- The President should fully implement U.S. human rights treaty obligations under ICERD and other human rights commitments by issuing a new executive order to revise and strengthen the Interagency Working Group on Human Rights Treaties and to enhance collaboration and consultation with NGOs and civil society on the federal, state and local levels.

- The Department of Justice should revise its June 2003 guidance on racial profiling to eliminate the loopholes created for national security and border searches, to include

religion as a protected class, and to apply the guidance to state and local law enforcement agencies.

- The Department of Justice should issue guidelines regarding the use of race by federal law enforcement agencies, including the FBI. The new guidelines should clarify that federal law enforcement officials may not use race, ethnicity, religion, national origin, or sex to any degree, except that officers may rely on these factors in a specific suspect description as they would any noticeable characteristic of a subject.

- The federal government should require that state and local police, particularly those participating in local immigration enforcement programs such as Secure Communities, collect race and ethnicity data for all stops and arrests and report to the federal government the race and ethnicity of persons turned over to Immigration and Customs Enforcement (ICE) so that racial/ethnic profiling in immigration enforcement activities can be measured.

- The Department of Homeland Security should suspend the 287(g) program pending a comprehensive, detailed review of the program that includes field hearings in those jurisdictions where 287(g) memoranda of understanding or agreement (MOUs or MOAs) are in place. The 287(g) program review should be undertaken by independent experts charged with determining whether and to what extent these programs:

  a. Increase racial or ethnic profiling;
  b. Enhance public safety;
  c. Undermine community policing efforts;
  d. Result in the arrest, detention, or deportation of U.S. citizens and legal permanent residents;
  e. Reduce individuals' likelihood of reporting crimes or serving as witnesses;
  f. Reduce access to education, health, fire, and other services by immigrants and members of their families and communities;
  g. Exceed the limitations established in the MOUs/MOAs;
  h. Are sufficiently supervised by ICE personnel;
  i. Collect data necessary to enable proper oversight;
  j. Are subject to sufficient community, municipal, state and federal oversight; and
  k. Undermine federal prosecutorial discretion or the ability of DHS to effectively set priorities in immigration enforcement.

- ICE should require that all law enforcement agencies ("LEAs") with 287(g) MOAs or MOUs or other agreements with ICE collect data on all contacts with the public. The data should include the following:

  a. Date, time and location of the stop or contact;
  b. Length of the stop;
  c. Make and model of the vehicle and whether the motorist was from out-of-state;
  d. Race and ethnicity of the motorist;
  e. Reason for the stop;
  f. Result of the stop (i.e., whether a ticket was issued, an arrest was made, or whether the driver was released with a warning);
  g. Whether a search was conducted;
  h. Type of search conducted (i.e., probable

cause, consent, or inventory search after an arrest was made);
i. What, if anything, was found in the course of the search;
j. Officer badge number or individual identifier; and
k. Passenger activity, if any.

- DHS should require all LEAs with MOAs or MOUs to create transparent complaint procedures that are communicated clearly to the public. The LEAs should print and disseminate brochures describing the complaint procedures; such brochures should be distributed by law enforcement officers during every interaction with the public. ICE should institute reporting requirements by all LEAs with MOAs or MOUs and should regularly review all reported activities. ICE should also require anti-profiling training by all LEAs entering into 287(g) MOAs or MOUs or other cooperation agreements or relationships with ICE.

- The DHS Office of Policy should issue guidance to all LEAs explicitly clarifying that their authority to engage in immigration enforcement is limited to narrow circumstances (i.e., where there is a *criminal* immigration violation and any state law limitations on authority are satisfied) and that any decision to assist DHS or participate in immigration enforcement must be voluntary and must comport with state and/or local laws and policies.

- DHS should require and fund meaningful training on the complexity of immigration laws, limitations of state/local authority, ICE enforcement priorities, and problems with profiling as a precondition to any officer's participation in 287(g) or any other program envisioning state and local participation in immigration enforcement.

- The federal government should establish comprehensive, robust, national standards for mandatory training of law enforcement officers on the ban against racial profiling.

- The federal government should develop a federal reporting and tracking system for capturing complaints of sexual harassment, sexual assault, and rape by police officers following racial profiling incidents.

- Law enforcement agencies should engage in thorough consultations with local communities before adopting or implementing local laws or regulations related to community safety. In addition, the federal government should establish a rigorous monitoring system to track law enforcement compliance with existing guidelines and statutes; such a monitoring body must be independent and have authority to investigate complaints.

- The federal government should end programs and policies that target Muslims, Arabs, and South Asians (or those perceived to be Muslim, Arab, or South Asian) without a concrete basis for suspicion, including FBI interrogations and delays by ICE in processing U.S. naturalization applications.

- The federal government should terminate the NSEERS program and repeal related regulations. Individuals who did not comply with NSEERS due to lack of knowledge or fear should not lose eligibility for, or be denied, a specific relief or benefit. Similarly, the federal government should provide relief to individuals who were deported for lack of compliance

with NSEERS but otherwise had an avenue for relief.

- Law enforcement agents should only inquire into travelers' religious and political beliefs and activities where such questioning is reasonably related to resolving a legitimate issue regarding admissibility to the United States or where there is a substantial nexus between the information such questioning seeks to elicit from that person and the investigation of a specific threat to national security.

- Law enforcement agencies should not infiltrate and monitor places of worship unless there is specific suspicion based on reliable evidence of criminal activity occurring in the facility at issue. Under no circumstances should law enforcement use informants to infiltrate places of worship or community centers and attempt to instigate illegal activity.

- The federal government should adopt a "reasonable suspicion" standard for border searches of electronic devices and personal papers, rather than leaving searches to the discretion of individual agents.

- The federal government should implement the recommendations of the U.N. Special Rapporteur on racism following his official visit to the U.S. in May and June 2008, including specific recommendations regarding racial profiling.

ANNEX A

American Civil Liberties Union Recommendations to the United States Government

Excerpt from American Civil Liberties Union report,
Race & Ethnicity in America: Turning a Blind Eye to Injustice (December, 2007)
Recommendations to the United States Government

ARTICLE 1
DEFINITION OF RACIAL DISCRIMINATION

- Enact federal, state and local legislation adopting the Convention's definition of "racial discrimination." That definition protects all minority groups, indigenous communities and non-citizens under U.S. jurisdiction and control, from both de jure and de facto discrimination.

ARTICLE 2:
ELIMINATE DISCRIMINATION & PROMOTE RACIAL UNDERSTANDING

- Conduct concerted, routine reviews of federal and state policies to analyze their discriminatory impact on minorities and non-citizens.
- Continue to monitor and enforce all school desegregation orders, and review policies with the goal of dismantling the "school-to-prison" pipeline.
- Eradicate racial profiling and racial disparities in investigation, prosecution and sentencing.
- Eliminate discriminatory housing policies and practices including in lending to minorities and in affording housing to minority women victims of domestic violence as well as members of racial and ethnic groups with criminal convictions.
- Promote affirmative measures and policies to ensure the full enjoyment of human rights by members of minority groups; to eliminate structural racism, sexism and institutional exclusion; and expand its use in redressing past discrimination suffered by minorities including women and indigenous communities, particularly in the areas of education and employment;
- Remove barriers to affirmative action policies and programs including barriers to school desegregation and equitable pay for minorities.
- Effectively plan for crises such as Hurricane Katrina, including by seeking the meaningful participation of the impacted community in reconstruction efforts.
- Eradicate the persistent poverty in the Katrina region and increase efforts to provide equal access to housing, education and health care to minority communities in the Gulf Coast areas.

ARTICLE 3
CONDEMN AND ERADICATE ALL RACIAL SEGREGATION

- Amend housing and zoning policies and adopt specific measures with the goal of eliminating de facto housing segregation.

- Increase the availability of affordable public housing for minorities.

- Develop and implement policies and projects aimed at avoiding separation of communities, in particular in the areas of housing and education.

ARTICLE 5
EQUAL TREATMENT BEFORE THE LAW

Respect the Rights of Criminally Accused & Disproportionately Confined Minorities

- Require states to properly fund and supervise their indigent defense systems.

- Prohibit juvenile waiver of counsel and the pre-adjudication detention of juveniles.

- End the disproportionate confinement of people of color, including women and children of color, in prisons, jails, and immigration and juvenile detention facilities.

- Ensure that the arrest, detention or imprisonment of children is used only as a measure of last resort and for the shortest appropriate period of time.

- Improve medical and psychiatric care, and educational services, in prisons, jails, immigration detention and juvenile detention facilities for minorities, including women and children of color.

- Develop policies and practices for girls of color in juvenile detention that acknowledge their unique needs, eliminate dangerous and excessively punitive practices, and establish meaningful and independent oversight and accountability mechanisms.

- Eliminate discrimination against non-citizens, especially against undocumented migrant workers. Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens.

Repeal Laws with Disproportionate Impact on Minorities

- Repeal all 21 states' "three strikes" laws as they disproportionately affect minority groups.

- Amend the federal sentencing guidelines to prevent any discriminatory impact on minorities including by further reducing disparity in penalties for crack and powder cocaine offenses.

- Require that all labor protection laws, such as the National Labor Relations Act, the Fair Labor Standards Act, and the Occupational Health and Safety Act apply to domestic workers and farm workers;

Conduct Independent and Prompt Investigations of Allegations of Abuse

- Thoroughly and promptly investigate all allegations of discriminatory abuse of minorities in U.S. prisons, jails and detention facilities.

- Establish independent oversight bodies to investigate complaints by minorities of discriminatory abuse by law enforcement and correctional officers, and to monitor conditions in all prisons, jails, and detention centers.

- Hold accountable all individuals, including government officials, members of the armed forces, correctional officers, police, prison guards, medical personnel, and private government contractors who have authorized, condoned or committed torture and other cruel, inhuman or degrading treatment or punishment against citizens and non-citizens held in U.S. custody.

- Effectively investigate, prosecute and punish perpetrators of acts of sexual violence, including rape, of Native American women.

End Racial & Ethnic Profiling

- Ban all ethnic and racial profiling practices by state law enforcement officers and ensure that states comply with bans already in place including the collection of racial profiling data.

- Urge the U.S. Congress to pass the End Racial Profiling Act of 2005.

- Ensure that all air-traffic related searches of individuals are based on suspicion and conducted within appropriate parameters and employ the least intrusive measures possible.

End Capital Punishment and Juvenile Life Without Parole

- Ban all capital punishment, and impose a national moratorium on its use until race bias in the application of federal and state death penalty statutes has been eliminated.

- Abolish the sentence of life without parole for children convicted of federal crimes. Enable child offenders serving life without parole to have their cases reviewed by a court for reassessment with the possibility for parole.

Cease Discrimination & Violence against Muslims, Migrants & Women

- Halt government programs and policies that target Muslims without a basis for suspicion, including FBI interrogations and delays by ICE in processing U.S. naturalization applications.

- Ban the use of tasers by law enforcement officials and correctional officers at the federal, state, and local levels, pending the outcome of an independent inquiry into their safety and use, including racial disparities in their deployment.

- Return jurisdiction of sexual offenses to tribal courts allowing these courts to prosecute cases of sexual violence against indigenous women, and provide indigenous communities adequate resources to prevent and care for rape victims.

- Take effective measures to provide culturally-sensitive training for all law enforcement officers that accounts for the specific vulnerability of Native women and racial and ethnic minority women to gender-based violence.

- Take measures to address the situation of intersectional discrimination, in particular regarding women and children from the most disadvantaged and poor racial and ethnic groups.

- Urge the UN to adopt codes of conduct regulating the treatment and protection of migrant domestic workers and require their staff to abide by that code, taking disciplinary action in the event of violations.

Expand and Enforce Political Rights

- Allow all citizens, regardless of their criminal history, to vote. In the alternative, require all states to restore voting rights to people upon release from prison.

- Enforce the primary anti-discrimination provision of the Voting Rights Act, and allow private parties to always enforce rights under the Help America Vote Act.

Restore Rights of Non-Citizens

- Reform immigration policy immediately; ensure its compliance with human rights standards; and ensure it does not have a disparate impact upon persons on the basis of race, color, descent, or national or ethnic origin.

- Eliminate the penalty of criminal incarceration for violation of immigration laws.

- Support and fully fund alternatives to detention programs so that the detention of migrant children and families with children is a measure of last resort and only for the most exceptional circumstances.

- Mandate states to refrain from enforcing federal immigration laws, especially during national and state crises and emergencies.

- Ensure that border protection activities are conducted in a manner consistent with the Convention and other human rights standards.

- Discontinue all federal and state efforts to target, stigmatize, stereotype or profile non-citizens, including workers, in the absence of individualized suspicion of wrongdoing.

- Discourage states and localities from enacting unlawful and/or mean-spirited anti-immigrant legislation.

- Ensure that counter-terrorism measures do not discriminate in purpose or effect on the grounds of race, color, descent, or national or ethnic origin.

- Take necessary measures to ensure access to justice for all persons within United States jurisdiction without discrimination.

Assure Equal Access to Health Care & Equal Medical Treatment

- Improve standards of government health programs and ensure equal access for all persons to public medical care, and the equal, non-discriminatory treatment of all persons.

Reform Education Policies to Alleviate Discriminatory Impact

- Ensure that Congress reauthorizes the No Child Left Behind Act amended to provide for accountability for "Push-Outs"; strong

provisions for Out-of-District Transfers; improved accountability for graduation rates; and adequate support for schools and districts "in need of improvement."

- Increase government funding of minority-attended schools.

- Require schools to develop adequate and fair disciplinary criteria and referral procedures, explain racial disparities in disciplinary referrals, maintain accurate discipline records, and report all incidents of racial and ethnic harassment.

- Encourage states to use voluntary integration programs and discourage rezoning of school districts adverse to minority students' interests.

- Ban "zero tolerance" school discipline policies and prohibit the presence of armed police officers in schools except where legitimate security concerns require it.

- Discourage involuntary transfers to "alternative schools" that often fail to provide adequate educational services.

ARTICLE 6
ENSURE EFFECTIVE PROTECTION & REMEDIES FOR RACE DISCRIMINATION

- Ensure that federal judicial remedies, supplementing state jurisdiction, be available to redress discrimination and denial of constitutional and related statutory rights of immigrants, minorities, women, undocumented persons, and persons detained in the "war on terror".

- Guarantee the right of every person within U.S. jurisdiction to an effective remedy against the perpetrators of acts of racial discrimination as well as the right to seek just and adequate reparation for the damage suffered.

- Ensure the U.S. Department of Justice's Civil Rights Division returns to prosecuting traditional anti-discrimination cases, including those based on employment, housing, education and voting laws.

- Increase Congressional oversight of the Civil Rights Division's housing, employment, education and voting sections.

- Encourage expansion of federal and state laws that protect domestic violence victims from housing and employment discrimination.

- Strengthen protections in state anti-discrimination, tort and workers' compensation laws for undocumented persons.

ARTICLE 7
MEASURES IN TEACHING, EDUCATION & CULTURE TO COMBAT DISCRIMINATION & PROMOTE TOLERANCE

- Undertake meaningful outreach to educate the federal, state and local judiciaries, as well as the American public, about U.S. government obligations under the Convention.

- Promulgate legally enforceable measures to combat all racial and ethnic profiling, and race and ethnicity-related hate crimes; implement a nationwide collection of disaggregated data based on racial and ethnic groups, as well as gender.

- Establish a national human rights institution for the promotion and protection of human rights with a firm mandate to combat all forms of discrimination. In doing so, the government should consider the Principles relating to the Status of National Institutions (Paris Principles).

ANNEX B

Rights Working Group
Recommendations to the United States Government

Excerpt from Rights Working Group report,
Equal Treatment Denied: United States Immigration Enforcement Policies (January, 2008)
Recommendations to the United States Government

- The U.S. Congress must enact clear laws regarding procedures that law enforcement agents must follow when carrying out immigration raids to ensure that individuals are not targeted on the basis of race or ethnicity.

- The U.S. government should conduct extensive training and oversight regarding the use of warrants in residential and 'roving' or 'street' raids. Clear guidelines need to be provided to ICE agents regarding the use of warrants and access to legal counsel. Agents should be required to verify, to the extent possible, that an individual still lives at the residence where a warrant is being executed. ICE officials should announce who they are prior to entering and searching a residence. Increased oversight regarding the use of warrants would help to ensure that ICE does not target individuals on basis of race or ethnicity but instead upon information related to the individual's immigration status.

- Recently, ICE issued guidelines regarding treatment of individuals during raids; however, the guidelines only apply to raids where ICE expects to apprehend over 150 individuals in worksite operations. The guidelines do not apply to the vast majority of ICE enforcement operations including smaller worksite raids, home raids or 'roving' raids. ICE should promulgate additional guidance that applies to all raids and enforcement actions.

- The U.S. government should issue clear guidance regarding the treatment of children identified during or affected by raids or other immigration-related law enforcement actions.

- ICE should codify the National Detention Standards created by ICE in November 2000. This will ensure that all individuals are treated inhumanely irrespective of their race, ethnicity or national origin.

- To ensure the nation's immigration laws are administered fairly, the federal government should not permit state and local police to engage in immigration law enforcement activities. Federal, state and local governments should aggressively investigate any reports of racial discrimination or abuse.

ENDNOTES

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11 *See also* ACLU, Race & Ethnicity in America: Turning a Blind Eye to Injustice 63-64, 109, 173 n. 69 (2007) [hereinafter ACLU, Race & Ethnicity in America] (287(g) agreements, NSEERS, "national security exception" to Federal Guidelines were only some of the disastrous policies of the Bush administration that increased as opposed to diminished profiling).

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17 *See* ACLU, Sanctioned Bias: Racial Profiling Since 9/11 1-3, 8-11, 12-13, 17 (2004) *available at* http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf (*Department of Justice Guidance Regarding the Use of Race By Federal Law Enforcement Agencies* has national security exception that allows for blatant, discriminatory targeting of innocent Arabs, South Asians, and Muslims because it allows for racial and ethnic profiling in its domestic counterterrorism efforts); (finds that according to the Office of Inspector General Report, ethnic profiling was used to detain Middle Eastern, South Asian and Arab individuals who have had no connection with terrorism for having "suspicious items" such as pictures of famous buildings with them during traffic stops); (according to officer, racial profiling "utilized when you have no intelligence and you are casting a wide net and having to use a process of elimination out of that wide net").

18 The Center for Human Rights and Global Justice, Americans on Hold: Profiling, Citizenship, and the "War on Terror" 3-4, 10-11 (2007), *available at* http://www.chrgj.org/docs/AOH/AmericansonHoldReport.pdf.

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32 *See generally*, Kareem Shora, American-Arab Anti-Discrimination Committee & Shoba Sivaprasad Wadhia, Center For Immigrants' Rights, Penn State's Dickinson School of Law, NSEERS: The Consequences of America's Efforts to Secure Its Borders (2009).

33 U.S. Response, *supra* note 15, at 2-6.

34 *Id.* at 2; United States v. New Jersey, No. 99-5970 (MLC) (D.N.J. filed Dec. 22, 1999; United States v. Los Angeles, CV-00-11769-GAF (C.D. Ca).

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41 *Testimony of Edward Barocas, Esq. on behalf of the ACLU of New Jersey Before the N.J. Assembly Budget Committee* (2009).

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60 *See* Human Rights Council, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston,* ¶ 138, U.N. Doc. A/HRC/11/2/Add.S (May 26, 2009) (characterizing the standard for criminal liability for police as "very high").

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64 *See generally* 42 U.S.C. § 14141 (2006).

65 Hickman, *supra* note 63, at 2.

66 *See id.* at 7 (describing, in part, how "the median ratio was multiplied by the number of officers in non responding agencies to produce the imputed value").

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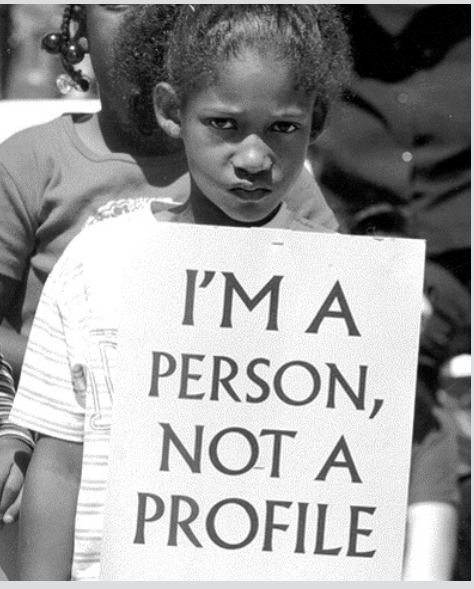
RACIAL PROFILING IS A VIOLATION OF HUMAN RIGHTS. Both Democratic and Republican administrations have acknowledged that racial profiling is unconstitutional, socially corrupting and counter-productive. However, in the 21st century, despite the United States' obligation to comply with the human rights standards and protections embodied in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the practice of racial profiling by members of law enforcement at the federal, state, and local levels remains a widespread and pervasive problem throughout the United States, impacting the lives of millions of people in African American, Asian, Latino, South Asian, Arab and Muslim communities.

Data and anecdotal information from across the country reveal that racial minorities continue to be unfairly victimized when authorities investigate, stop, frisk, or search individuals based upon subjective identity-based characteristics rather than identifiable evidence of illegal activity. Victims continue to be racially or ethnically profiled while they work, drive, shop, pray, travel, and stand on the street.

A major impediment to the eradication of racial profiling remains the continued unwillingness or inability of the U.S. government to pass federal legislation prohibiting profiling with binding effect on federal, state, or local law enforcement. Moreover, certain U.S. government policies continue to contribute significantly to the prevalence of racial profiling. Fifteen years after the United States ratified ICERD and one year after a review of U.S. compliance with the treaty, *The Persistence of Racial and Ethnic Profiling in the United States* is submitted to the U.N. Committee on the Elimination of Racial Discrimination as a follow-up report documenting violations of ICERD at the federal, state, and local levels.

The Obama administration and Congress now have an historic opportunity to take urgent, direct, and forceful action to rid the nation of the scourge of racial and ethnic profiling and bring the U.S. into compliance with both the Constitution and international human rights obligations.



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